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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES—UNLIMITED CIVIL**

**ROY LO, Individually and On Behalf of
All Others Similarly Situated,**

Plaintiff,

v.

NUTRIBULLET, LLC,

Defendant.

Case No.: 21STCV12852

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT AND
CERTIFICATION OF SETTLEMENT
CLASS**

Judge: Hon. William F. Highberger
Date: June 9, 2022
Time: 1:30 p.m.
Dept.: 10

[Filed concurrently with Declaration of Abbas Kazerounian; Declaration of Jason A. Ibey; Declaration of Adib Assassi; Declaration of Roy Lo; Declaration of Jacob Kamenir; and [Proposed] Order]

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I. INTRODUCTION

Plaintiff Roy Lo (“Plaintiff” or “Mr. Lo”) submits this motion for preliminary approval of a proposed class action settlement and certification of settlement class (the “Settlement”) in this action (the “Action”). The motion is unopposed by defendant NutriBullet, LLC (“Defendant” or “NutriBullet”).¹ The terms of the Settlement are set forth in the Settlement Agreement and Release (the “Agreement” or “Agr.”),² filed as Exhibit 1³ to the Declaration of Abbas Kazerounian (“Kazerounian Decl.”), ¶ 83; Exhibit 1.

In the Complaint, filed on April 2, 2021 (“Compl.”), Plaintiff alleges that Defendant chilled warranty claims and benefited monetarily to the detriment of consumers, by intentionally omitting disclosures required by California’s Song-Beverly Consumer Warranty Act from its product registration cards and online forms. Compl. ¶¶ 5-7. By not including such disclosures, and also by using language such “Warranty Registration” or “warranty registration card”, Defendant has allegedly violated: (a) California’s Song-Beverly Consumer Warranty Act (“SBA”), Civ. Code §§ 1790, *et seq.*; (b) California’s Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750, *et seq.*; and (c) California’s Unfair Competition Law (“UCL”), Bus. & Prof. Code §§ 17200, *et seq.* [Compl., ¶¶ 1, 24, 26]. NutriBullet denies any wrongdoing and all liability based on Plaintiff’s allegations but has agreed to settle this Action to resolve the claims of Plaintiff and all consumers who purchased any warrantied NutriBullet or Magic Bullet product in California or from NutriBullets’ website during the relevant time period. [See Agr. § III.A].

The Agreement, reached after an all-day private mediation with Judge Patrick Walsh (Ret.) and months of further negotiations (often with the assistance of the mediator), provides for meaningful relief to the Settlement Class Members. *See Agr.* at §§ IV.C, IV.E-F. Under the terms

¹ Plaintiff and Defendant are collectively referred to as the “Parties.”

² Unless otherwise specified, defined terms used in this memorandum are intended to have the meaning ascribed to those terms in the Settlement Agreement.

³ Exhibits are to the declaration of Abbas Kazerounian unless otherwise stated.

of the Agreement, Defendant has agreed to: (a) provide every Settlement Class Member with an automatic extended warranty on the Covered Products regardless of whether they submit a Claim Form [*id.* at § IV.F]; (b) prospectively refrain from using the statement “Warranty Registration Card” and all substantially similar statements in its print and online materials within six (6) months of preliminary approval [*id.* at § IV.E]; and (c) provide Settlement Class Members who submit a Valid Claim with a \$10.00 voucher towards a product sold by NutriBullet on its website [*id.* at § IV.C]; (c); . Distribution of vouchers to Settlement Class Members who submit a timely and valid Claim Form will be commenced within thirty (30) days of the Effective Date, to be completed no later than sixty (60) days of same. *See id.* at § IV.D.2. In return for such recovery, including a payment of any service award to Mr. Lo, and reasonable attorneys’ fees and costs to Plaintiff’s counsel (*see* Agr. § VI), Plaintiff and Settlement Class Members will release and discharge Defendant and other related Released Parties from the Released Claims (*id.* at § X.B).

While Plaintiff is confident of a favorable determination on the merits, Plaintiff believes it is desirable that the Action be fully and finally compromised, settled, and forever barred pursuant to the terms and conditions set forth in the Agreement in order to eliminate the risks and further expense of litigation, including what would be a contested motion for class certification. Plaintiff agrees that this Settlement provides substantial settlement benefits to Settlement Class Members. *Id.* at § I.I. As indicated in the Agreement, Defendant denies liability and any wrongdoing but has also determined that it is desirable to settle this Action in an effort to avoid the expense, inconvenience and inherent risk of continued litigation. *Id.* at § I.L.

Accordingly, Plaintiff moves for an order: (1) certifying the class action for settlement purposes; (2) preliminarily approving the proposed Settlement; (3) appointing the named Plaintiff, Roy Lo, as a Class Representative; (4) appointing Abbas Kazerounian, Esq. and Jason A. Ibey, Esq. of the Kazerouni Law Group, APC, and Adib Assassi, Esq. of the Black Oak Law Firm, as Class Counsel; (5) approving the class notice program; and (6) scheduling a Final Approval Hearing (no earlier than 100 days after the entry of the preliminary approval order).

As explained below, the proposed Settlement satisfies all of the criteria for preliminary

settlement approval under Cal. Civ. Proc. § 382 and is fair, adequate and reasonable.

II. BRIEF PROCEDURAL HISTORY

After the Action was filed on April 2, 2021, the Parties attended private mediation before the Honorable Patrick Walsh (Ret.) on August 11, 2021. A Joint Initial Status Conference Statement was filed on September 16, 2021. The Parties then appeared for an initial scheduling conference on September 22, 2021. By Minute Order dated September 22, 2021, the Court set a non-appearance case review for December 22, 2021, in light of the class action settlement in principle. A joint status report was submitted on December 15, 2021, and the Court thereafter continued the non-appearance case review to February 3, 2022. Subsequently, the non-appearance case review was continued to June 1, 2022. After several months of negotiations post-mediation, including with further assistance of the mediator, the Settlement Agreement was signed by Plaintiff on March 23, 2022 and fully executed by Defendant on April 11, 2022. On March 28, 2022, Plaintiff submitted a stipulation for excess pages, requesting up to 21 pages for this motion; that stipulation is pending a ruling. Plaintiff now submits the present motion for preliminary approval of class action settlement and certification of settlement class, which Plaintiff understands is unopposed by NutriBullet.

III. THE SETTLEMENT

A. The Settlement Class

The Settlement Class Members include:

All persons who purchased one or more of Defendant's warranted products within California between August of 2019 and the date of entry of a preliminary approval order.

Id. at § III.A.

Excluded from the Settlement Class are: (1) NutriBullet and its respective affiliates, employees, officers, directors, agents, and representatives, and their immediate family members; (2) Settlement Class Counsel and partners, attorneys, and employees of their law firms; (3) The judge(s) who have presided over the Action, or the mediator, and their immediate family members; and (4) All individuals or entities who purchased the Covered Products for resale. *Id.* at § III.A.

1 **B. Settlement Relief**

2 The relief to Settlement Class Members includes a \$10 voucher, an extended warranty on
3 purchased Covered Products, and positive changes in the marketing practices of NutriBullet.

4 **1. Automatic Extended Warranty**

5 NutriBullet has also agreed to afford every Settlement Class Members (regardless of whether they
6 submit a valid Claim Form) with an Extended Warranty on the Covered Products. *Id.* at § IV.F.1.
7 This form of relief was negotiated to specifically address the harm Plaintiff alleges against
8 Defendant for having violated the SBA and chilling warranty claims. The extension of the warranty
9 for Covered Products would be effective for six (6) months from the date of preliminary approval or
10 last for eighteen (18) months from the date each Covered Product was purchased, whichever occurs
11 later. *See id.* at §§ IV.F.1-3.

12 **2. Warranty, Website, and Literature Changes**

13 NutriBullet has also agreed to remove, or otherwise refrain from using, the allegedly impermissible
14 statement “Warranty Registration Card” and all substantially similar statements from the
15 registration materials contained within the Covered Products’ packaging as well as on Defendant’s
16 website and online advertisements that it controls. *Id.* at § IV.E.1. These changes are to be
17 commenced within six (6) months after the Settlement Agreement is preliminarily approved by the
18 Court. *Id.* Defendant is not required to remove any Covered Products currently in the stream of
19 commerce or to revise the packaging or package contents of any Covered Products that have already
20 been manufactured or packaged. *Id.* at § IV.E.2.

21 **3. Voucher and Claim Form**

22 As part of the Agreement, NutriBullet will provide a \$10.00 voucher (not a coupon) to any
23 Settlement Class Members who submit a timely and valid Claim Form (online via the Settlement
24 Website or by U.S. Mail.) *See Agr.* at §§ II.D and V.A; *see also*, Exhibit A thereto. Specifically,
25 Settlement Class Members who submit a Valid Claim will receive a \$10.00 voucher from
26 NutriBullet that may be used towards any product sold by NutriBullet on its website. The voucher
27 will be valid for fifteen (15) months after it is sent to Settlement Class Members, and it is freely
28

transferrable. *Id.* at § IV.C. This voucher is redeemable on NutriBullet’s website for purchases (excluding purchase of parts) that exceed \$30.00 before shipping and taxes. *Id.*

Settlement Class Members will have 30 days from the Notice Date to submit a Claim Form, via the Settlement Website or via mail, in order to be eligible to receive a Voucher Award. Agr. § V.A, §§ II.C-E, § II.U. The proposed Claim Form is attached as Exhibit A to the Agreement. *Id.* at § II.D. The Settlement Class Members are required to affirm on the Claim Form that he or she purchased at least one of the Covered Products from NutriBullet in the State of California or from NutriBullet’s website (nutribullet.com) during the Class Period. *Id.* Settlement Class Members may submit only one Claim Form to participate in the Settlement, regardless the number of Covered Products⁴ purchased during the Class Period. *Id.* at § IV.C.

4. Class Representative’s Application for Service Award

The Agreement contemplates that Class Counsel will request a service award paid by NutriBullet to the named Plaintiff in an amount not to exceed \$3,000 for his services as Class Representative. *Id.* at § VI.B. Court approval of any service award is not a condition of the Settlement, and Defendant will not object to an incentive award that does not exceed \$3,000. *Id.* Such a service award is reasonable and appropriate. *See e.g., In re Nexus 6P Prods. Liab. Litig.*, No. 17-cv-02185-BLF, 2019 U.S. Dist. LEXIS 197733, at *41-43 (N.D. Cal. Nov. 12, 2019) (approving a \$3,000 service award for each of the 13 class representatives in an SBA class action and noting that “[i]ncentive awards typically range from \$2,000 to \$10,000. [citation omitted].”).

5. Class Counsel’s Request For Attorneys’ Fees and Costs

The Agreement contemplates and permits Class Counsel to apply to the Court for an award of attorneys’ fees and costs to be paid by NutriBullet. Agr. at § VI.A. NutriBullet will not oppose a motion for an aggregate Attorneys’ Fees and Costs Award of up to one hundred ninety-five thousand dollars (\$195,000). *Id.*; *see e.g., Wahl v. Yahoo! Inc.*, No. 17-cv-02745-BLF, 2018 U.S.

⁴ A complete list of the Covered Products and their labels will be available to Settlement Class Members on the Settlement Website. *See* Agr. §VIII; Exhibit D to Agreement (Notice for Settlement Website, Section 4, p. 5).

Dist. LEXIS 195287, at *20 (N.D. Cal. Nov. 15, 2018) (awarding \$285,313.66 in attorneys’ fees and \$14,686.34 in costs in a class settlement).

6. Appropriate Notice Program

California has abundant authority providing guidance to trial courts when fashioning notices of class action settlements. *See, e.g.*, Cal. Rules of Court, rule 3.766; *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1164 (2000); *accord*, *Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1390–1393. Here, notice will be given to Settlement Class Members in multiple ways to best ensure notice is provided in a reasonable and practical manner to Settlement Class Members. In particular, notice will be provided: (1) by email for which NutriBullet has an email address for online purchases in California (Exhibit B to Agr.); (2) by targeted internet banner advertisements (Exhibit C to Agr.); and (3) by detailed notice on the Settlement Website (Exhibit D to Agr.). *See also*, Agr. § II.F; Declaration of Jacob Kamenir (“Kamenir Decl.”), ¶¶ 3-7.

Each form of notice will provide a summary (or link to a summary) of the important details about the Settlement, including deadlines and instructions on how to submit a Claim Form, opt out or object. The proposed settlement administrator here is Simpluris (“Settlement Administrator”, Agr. §§ II.MM; III.D). To facilitate email notice, Defendant will provide the Settlement Administrator with relevant contact information in its possession for Settlement Class Members including their last known email addresses. *See* Agr. § I.O. *See also*, Kamenir Decl., ¶ 6.

Plaintiff only seeks class certification for settlement purposes under Cal. Civ. Proc. Code § 382. Plaintiff does not separately request class certification under the special rules for a certified class under Cal. Civ. Code § 1781 of the CLRA. Therefore, the Court should not require class notice to be provided by means of newspaper or general circulation in any county in California. Regardless, subdivision (f) of Cal. Civ. Code § 1781 mandates that notice of a settlement class be given “as the court directs,” thus granting the trial court discretion to fashion notice of a settlement class, provided the court orders that notice be sent “to each member who was given notice pursuant to subdivision (d).”

1 The Settlement here already calls for direct notice via: (1) known email addresses where
2 available, (2) internet banner advertisements, and (3) a Settlement Website. Agr. § II.F. *See Retta v.*
3 *Millennium Prods.*, No. CV15-1801 PSG AJWx, 2017 U.S. Dist. LEXIS 220288, at *7 (C.D. Cal.
4 Aug. 22, 2017) (granting final approval for alleged violations of the CLRA, UCL and other
5 consumer protection statutes where notice was provided by email, internet banner advertisements,
6 and social media); *Hinkle v. Sports Research Corp.*, No. 37-2020-00001422-CU-NP-NC, 2021 Cal.
7 Super. LEXIS 411 (San Diego Super. Ct. March 26, 2021) (granting final approval where notice
8 was given using email, postcard to the extent a valid email was unavailable, and internet
9 advertisement); *Lloyd v. Navy Fed. Credit Union*, No. 17-cv-1280-BAS-RBB, 2019 U.S. Dist.
10 LEXIS 89246, at *9 (S.D. Cal. May 28, 2019) (finally approving settlement where notice was
11 provided by email or mail (as available), and long form notice on the settlement website). “Courts
12 have come to accept both email and internet notice campaigns as acceptable means of giving notice
13 in class actions” and they “are beginning to embrace the belief that internet notice may be
14 preferable to traditional methods of publication notice.” Making Class Actions Work: The Untapped
15 Potential of the Internet, 69 U. Pitt. L. Rev. 727, 733-734 (Summer 2008).

16 Thus, the proposed notice to the Settlement Class Members is reasonable and appropriate
17 and should be preliminarily approved.

18 **7. Opportunity to Request Exclusion and Object to the Settlement**

19 Settlement Class Members will have 45 days to request exclusion from (opt out) of the
20 Settlement or to object to its terms. *See id.* at § II.Y (the Opt-Out And Objection Date is 45 days
21 from the Notice Date).

22 Settlement Class Members who wish to opt out of the Settlement may do so by completing
23 and mailing an exclusion request to the Settlement Administrator that is post marked or submitted
24 electronically through the Settlement website’s online form no later than the Opt-Out And
25 Objection Date. *Id.* at § VII.D.1. The exclusion request must be personally signed by the Person in
26 the Settlement Class requesting exclusion, contain a statement that indicates his or her desire to be
27 excluded from the Settlement Class in the matter of *Lo v. NutriBullet, LLC* (or sufficient words to
28

indicate the present lawsuit against NutriBullet), and contain a statement that he or she is otherwise a Person in the Settlement Class and purchased one or more of the Covered Products. *See id.*

To object, the Settlement Class Member must include in the objection submitted to the Court and served on Class Counsel and NutriBullet's Counsel: (1) the name, address, telephone number of the Person objecting and, his or her counsel, if any; (2) a signed declaration stating that he or she is a Person in the Settlement Class and purchased one or more of the Covered Products; (3) a statement of all objections to the Settlement Agreement and any supporting documentation; and (4) a statement of whether he/she intends to appear at the Final Approval Hearing, either with or without counsel, and if with counsel, the name of counsel who will attend. *Id.* at § VII.C.

8. Scope of Release

In exchange for the Settlement consideration discussed above, Plaintiff and all Settlement Class Members will generally relinquish claims, claims for damages, and equitable relief (including injunctive relief), legal and/or administrative relief, interest, demands, or rights, arising from or relating to the Covered Products, including the Claims made by the named Plaintiff in the Action for violations of the SBA, CLRA, and UCL, or any comparable state consumer protection statute that would give rise to claims for the warranty materials as it concerns the Covered Products. Agr. at §§ II.FF, X.B. This release includes Claims arising from or relating to the alleged improper warranty information on Defendant's warranty registration cards and online warranty registration form, based on the SBA, CLRA, UCL or any comparable state or federal law by the named Plaintiff or any Settlement Class Members against the Released Persons. Agr. at §§ II.FF, X.B. Expressly excluded from the release is any and all claims for bodily injury. *Id.* Thus, the scope of the release is appropriately tailored. Additionally, the Parties further agree to a release of claims under Section 1542 of the Civil Code of the State of California. Agr. at § X.B.3.

9. Termination of Settlement

The Agreement contains a reasonable termination provision that provides that the Agreement will be terminable if: (1) the Settlement Agreement is not approved or its approval is reversed; (2) the Settlement Agreement's terms, exclusive of those concerning attorneys' fees and

costs and the service award, are materially altered by the Court or on appeal; (3) the Preliminary Approval Order or Final Order and Judgment, as set forth in the Settlement Agreement, is not entered by the Court, is reversed or materially modified on appeal or remand to the detriment of a Party seeking termination, or otherwise fails for whatever reason; or (4) the total number of individuals opting out of Class Settlement is over 100. *Id.* at § XI.

IV. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS FOR PURPOSES OF IMPLEMENTING THE SETTLEMENT

Class action suits in California are appropriate, “when the question is one of a common or general interest . . . or when the parties are numerous, and it is impracticable to bring them all before the court.” Cal. Civ. Proc. Code § 382. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981). Two requirements must be met to sustain a class action: (1) there must be an ascertainable class; and (2) there must be a “well defined [*sic*] community of interest in the questions of law and fact involved affecting the parties to be represented.” *Daar v. Yellow Cab. Co.*, 67 Cal. 2d 695, 704 (1967). In turn, a community of interest is established where: (1) there are predominant common questions of law or fact; (2) the Representative Plaintiffs have “claims or defenses typical of the class;” and (3) the Representative Plaintiffs can adequately represent the class. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1806 (1996).

This Action should be conditionally certified solely for the purposes of a class-wide Settlement. *See e.g., Hernandez v. Vitamin Shoppe Industries, Inc.*, 174 Cal. App. 4th 1441, 1457 (2009) (“The moving parties have shown the existence of ascertaining classes, and well-defined community of interest in the questions of law and fact among the represented parties. The court unquestionably had the authority to conditionally certify a class for settlement purposes.”) (internal citations omitted). The proposed Settlement Class definition here encompasses all individuals within the State of California who purchased one or more of the Covered Products between August 1, 2019, and the date of entry of a preliminary approval order (close to a 3-year period). Agr. At §§ II.G, III.A. The Agreement meets the requirements necessary for class certification because there is a well-defined community of interest in this litigation, and relief of the kind required under the Agreement is meaningful and

beneficial to the Settlement Class Members.

In *Knapp v. Art*, for instance, a court granted final approval of a settlement class composed of 452 members, each of whom were to receive a \$10.00 voucher as well as injunctive relief whereby the defendant agreed to alter its “advertising and pricing practices [to] comply with applicable laws.” 283 F. Supp. 3d 823, 829-33 (N.D. Cal. 2017). Similarly, in *Gonzalez v. Luby’s Fuddrucker’s Rests.*, another court determined that class settlement terms were fair where each class members were awarded either \$6.00 or \$9.00 vouchers (depending on whether they have proof of purchase) and injunctive relief requiring the defendant to change the name of its menu item from “Kobe beef” to “American Kobe Burger.” BC565138, 2017 Cal. Super. LEXIS 8137, at *6-8 (Cal. Super. Ct. June 15, 2017).

A. Numerosity

While there is no set number required as a matter of law for the maintenance of the class action, there are at least thousands of Settlement Class Members in light of the fact that NutriBullet claims to have approximately 50 million customers worldwide.⁵ This is sufficient for a common question of interests to “many” persons. *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) (upholding a class of 42). Joinder of thousands of persons throughout the State of California would be impractical.

B. Commonality

There are several questions of law and fact common to Plaintiff and to the Settlement Class Members. These common questions of law and fact include, but are not limited to, the following: (a) whether NutriBullet violated the SBA by making the Covered Products’ warranties contingent upon registration and not disclosing that failure to register the Covered Products did not affect warrant rights (*see* Agr. § I.E); (b) whether Defendant engaged in false or deceptive advertising practices in violation of the CLRA by not disclosing the warranty registration requirement of Covered Products; and (c) whether the Settlement Class is entitled to equitable relief. *See* Compl. ¶ 44.

⁵ *See* NutriBullet, *About Us*, <https://www.nutribullet.com/about-us/> (last visited Nov. 4, 2021) (“We are leading innovators of the personal, single-serve countertop blender nutribullet with over 50 million happy customers worldwide.”).

C. Typicality

Typicality requires that class representatives be members of the class they seek to represent. *B.W.I. CustomKitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1347 (1987). A class representative's claim is typical if it arises from the same event, practice or course of conduct that gives rise to claims of other class members, and if his or her claims are based on the same legal theory. *Classen v. Weller*, 145 Cal. App. 3d 27, 46-47 (1983).

Plaintiff's claims are typical of the claims of the members of the Settlement Class Members. Plaintiff, like other Settlement Class Members, purchased one or more Covered Products during the Class Period that were accompanied by Defendant's warranty materials and forms that failed to include the required warranty language dictated by the SBA and included allegedly impermissible language of "Warranty Registration Card" and substantially similar statements. Agr. § IV.E.1; *see also* Compl. ¶¶ 20-34. Plaintiff purchased a NutriBullet Blender Combo for approximately \$140 from Costco Wholesale in Woodland Hill, California, in July of 2020. Lo Decl., ¶ 15; Compl., ¶ 17. Plaintiff is therefore advancing the same claims and legal theories on behalf of himself and all absent members of the Settlement Class. Defendant has no defenses unique to Plaintiff. Plaintiff's claims are thereby representative of, and reasonably co-extensive with, the claims of the Settlement Class during the period of August 1, 2019, to the date of a preliminary approval order.

D. Adequacy of Representation

Adequacy of representation is met where the proposed class representatives have retained qualified counsel, their interests are aligned with the class, and they can vigorously prosecute class claims. *Cal Pak Delivery, Inc. v. United Parcel Serv.*, 52 Cal. App.4th 1, 12 (1997).

Here, Mr. Lo is a member of the Settlement Class, and to the knowledge of Class Counsel, has does not have any conflicts of interest with other Class Members. Kazerounian Decl., ¶ 12. Plaintiff also states that he has no known conflicts of interest with his counsel or any Settlement Class Member. Declaration of Roy Lo ("Lo Decl."), ¶ 14. Counsel representing Plaintiff are competent and experienced in litigating consumer class actions. *See* Agr. at § III.E; Kazerounian Decl., ¶¶ 19-82; Ibey Decl. ¶¶ 18-22; Assassi Decl., ¶¶ 12-16. Based on a thorough pre-filing investigation (Kazerounian

Decl., ¶ 8) and the skill of Plaintiff's counsel, Plaintiff and his counsel were able to obtain an early beneficial settlement calling for changes in Defendant's practices, as well as substantial relief for Settlement Class Members.

Therefore, Plaintiff has fairly and adequately represented and will continue to protect the interest of the Settlement Class Members.

E. Superiority of Class Action

A class action settlement is the superior method of resolving the claims of the Settlement Class Members since Plaintiff meets each of the elements for class certification. *See Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 332 (2004); *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 741 (2004). A class-action is superior to all other available means for the fair and efficient adjudication of this controversy. Individual litigation would increase the delay and expense to all parties and court systems involving the issues raised by this action. The injury suffered by each individual member of the proposed class is relatively small in comparison to the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendant's conduct. *See Compl.*, ¶ 51; *see e.g., Barrett v. Wesley Fin. Grp., LLC*, No. 13cv554-LAB (KSC), 2015 U.S. Dist. LEXIS 189410, at *19 (S.D. Cal. Mar. 30, 2015) (finding an award of \$500 insufficient to motivate individual lawsuits). Individual litigation necessitating expert discovery would increase the delay and expense to all parties, and to the court system, presented by the complex factual issues of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. Thus, a swift class action settlement here is the superior method of resolving the particular dispute at issue in this Action.

V. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT

Settlement of a class action requires approval of the Court pursuant to Cal. Rules of Court, rule 3.769, which affords court's broad discretion in determining whether to approve or reject a proposed settlement. *See Carter v. City of Los Angeles*, 224 Cal. App. 4th 808, 819 (2014) ("Trial courts have broad discretion in granting or denying motions for class certification because they are ideally

1 situated to evaluate the efficiencies and practicalities of permitting a class action.”). At the preliminary
2 approval stage—which precedes a formal fairness hearing—the Court need only decide whether the
3 proposed settlement falls within a range of possible final approval. *Koz v. Kellogg Co.*, 2013 U.S.
4 Dist. LEXIS 64577, at *13 (S.D. Cal 2013); *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078,
5 1079-1080 (N.D. Cal. 2007). *See generally*, Judicial Council of California, Deskbook on the
6 Management of Complex Civil Litigation § 3.76[2] (2012) (noting that settlement approval is a
7 three-step process where the court makes a preliminary finding that the terms and conditions are
8 fair, adequate, and reasonable; notice is then given to the class members; and finally, the court holds
9 a fairness approval hearing).

10 A class settlement will be approved if the settlement is found to be fair, adequate, and
11 reasonable. *Dunk*, 48 Cal. App. 4th at 1801. In making this determination, courts consider several
12 factors, including “the strength of the plaintiffs’ case, the risk, expense, complexity and likely
13 duration of further litigation, the risk of maintaining class action status through trial, the amount
14 offered in settlement, and the extent of discovery completed and the stage of the proceedings, the
15 experience and views of counsel, the presence of a governmental participant, and the reaction of the
16 class members to the proposed settlement.” *Id.* The below factors are non-exhaustive, and the court
17 “is free to engage in a balancing and weighing of factors depending on the circumstances of each
18 case.” *Reed v. United Teachers Los Angeles*, 208 Cal. App. 4th 322, 337 (2012).

19 **A. The Settlement Agreement is Entitled to a Presumption of Fairness**

20 Generally, a presumption of fairness exists where: (1) the settlement is reached through
21 arm’s length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
22 court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
23 objectors is small. *Dunk, supra*, 48 Cal. App. 4th at 1802. The proposed Settlement here satisfies the
24 above three requirements, and it is unlikely that many objections would arise.

25 **1. Settlement Was Reached Through Arm’s Length Negotiations**

26 California courts recognize that “a presumption of fairness exists where ... [a] settlement is
27 reached through arms’ length bargaining.” *Id.* The Settlement in this case is the result of non-collusive,
28

arm's length and informed negotiations over a period of months, conducted between Plaintiff's counsel and Defendant's counsel. In the lengthy negotiation process, each party was represented by counsel, and a full-day mediation was held before the Honorable Patrick Walsh (Ret.), who further facilitated the resolution of the matter on terms amenable to both Parties. Kazerounian Decl., ¶ 10; Agr. § I.H. There should be no doubt that the Settlement in this case is the result of serious, non-collusive, and informed mediation.

2. Investigation and Discovery are Sufficient to Allow Counsel and the Court to Act Intelligently

The Parties actively engaged in negotiating settlement for several months. Kazerounian Decl., ¶¶ 8-9. The Action was commenced on April 2, 2021. Subsequently, the Parties, through counsel, informally exchanged information, weighing the strengths and weaknesses of each side's respective legal arguments concerning Defendant's potential liability and defenses, and the strength of Plaintiff's claims. Plaintiff engaged in pre-filing investigation, including online research, and the Parties exchanged further information informally during the all-day private mediation with Judge Walsh (Ret.). Kazerounian Decl., ¶¶ 8-10.

3. Plaintiff's Counsel are Experienced in Similar Litigation

Counsel for Plaintiff are highly experienced in prosecuting consumer class actions, including cases involving deceptive advertising of a product, among others. In particular, Class Counsel have filed and successfully settled false advertising cases concerning consumer products, similar to this one. *See, e.g., Giffin v. Universal Protein Supplements Corporation d/b/a/ Universal Nutrition et al.*, No. BC613414 (Superior Court of California, County of Los Angeles) (finally approved class action settlement alleging violation of California law involving Made in USA representations); *Duenas v. Freedom Laser Therapy, Inc. d/b/a iRestore*, No. 30-2019-01060877-CU-BT-CXC (Sup. Ct. Orange County) (finally approved class action settlement involving alleged false or misleading claims concerning a laser hair growth product). *See also* Kazerounian Decl., ¶¶ 19-27; Ibey Decl., ¶¶ 13-22; Assassi Decl., ¶¶ 12-16.

4. The Settlement is "Fair, Adequate, and Reasonable"

Beyond the presumption of fairness, the Settlement Agreement is clearly "fair, adequate and

reasonable” under any standard. In making a fairness determination, courts consider a number of factors, including: (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status through trial; (4) the benefits conferred by settlement; (5) the experience and views of counsel; (6) the extent of discovery completed and the state of the proceedings; and (7) the reaction of class members to the proposed settlement. *See Dunk*, 48 Cal. App. 4th at 1801 (citation omitted); *see also, 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at 1146. However, “[t]he inquiry ‘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.’” *Dunk*, 48 Cal. App. 4th at 1801 (citation omitted).

i. *The strength of Plaintiff’s case*

After investigations and discussions with Defendant, Plaintiff and proposed Class Counsel believe they have a strong case for violations of the CLRA, UCL, and SBA that would likely prevail at trial. Defendant naturally disputes such allegations and believes it has a good chance of prevailing at trial. While each side believes in its respective case, the Parties agree that this settlement will help them avoid the great expense, inconvenience, and inherent risk involved in prolonged litigation. *See Agr. at §§ I.I, I.L.* Without an early settlement, however, Defendant would continue to vigorously contest liability and damages, requiring expert analysis and motion practice concerning Plaintiff’s claims, Defendant’s potential defenses, and the appropriate measure of damages. Defendant would also challenge the propriety of class certification outside of the settlement context. As such, the outcome of the case is by no means certain absent a settlement.

ii. *The Risks, Complexity, and Likely Duration of Further Litigation*

Plaintiff believes that the claims asserted in the Action are meritorious, but Defendant continues to deny that Plaintiff is entitled to any form of damages or relief based on the conduct alleged. *Id. at §§ I.E-F.* Given the Parties’ positions on this case and considering the fact that the parties have actively negotiated the Action, continued litigation would be protracted, unduly

burdensome, and expensive. With the allegations raised by Plaintiff, in order to fully prosecute this case through to trial, there would be a great deal of written discovery, depositions, and competing expert opinions as to the warranty claims and any diminished value of the products at issue. With the Agreement, the Parties are negating the need to spend hours of the Court's time, counsel's time, expert costs and other associated costs, all while bringing meaningful relief to the Settlement Class. Thus, it is desirable, fair, and beneficial to the Settlement Class that the Action be fully and finally compromised at this time.

NutriBullet denies that it committed any wrongful act or violated any law or duty, and maintains that it has meritorious defenses to all claims alleged in the action. *Id.* Although the Parties reached a Settlement prior to a responsive pleading being filed by NutriBullet, Plaintiff understands that Defendant would likely raise several affirmative defenses to the Action and possibly a demurrer. Although the court in *Schneider v. All-Clad Metalcrafters, LLC*, No. 30-2021-01189853-CU-BT-CXC, 2021 Cal. Super. LEXIS 8074 (Sup. Ct. Orange County, Sept. 28, 2020)⁶ overruled a demurrer on similar claims, the court in *Naseri v. Greenfield World Trade, Inc.*, No. SACV 21-01084-CJC (KESx), 2021 U.S. Dist. LEXIS 150274 (C.D. Cal. Aug. 10, 2021) granted a Rule 12(b)(6) motion to dismiss on similar claims in the Central District of California.

While both sides strongly believe in the merits of their respective positions in this case, there are risks to both sides in continuing the Action. *Id.* at §§ I.I, I.L. Class Counsel understand that there are uncertainties associated with complex class action litigation and that no one can predict the outcome of the case. *See Kazerounian Decl.*, ¶ 12; *see also*, Agr. § I.I. Nevertheless, Class Counsel are confident that at least some class would be certified here, should the case proceed, even though Defendant would vigorously defend the action. If the Action were to continue, challenges would likely be made to any class certification motion made by Plaintiff, thereby placing in doubt whether a

⁶ California Rule of Court, rule 8.1115(a), does not prohibit the citation of this unpublished decision because it is neither a decision from a California Court of Appeal nor from a superior court appellate division. It was decided by trial court Judge Glenda Sanders of the Superior Court of California, County of Orange.

class could be certified in the action, and additional substantive challenges to the claims may be raised.

In considering the Settlement, Plaintiff and Class Counsel carefully balanced the risks of engaging in protracted and contentious litigation against the benefits to the Settlement Class. Kazerounian Decl., at ¶¶ 9-12. Similarly, Defendant has to recognize that, if a class were certified on a contested motion, there would be the risk of large statutory damages and possibly punitive damages, in addition to restitution and/or other injunctive relief, which would substantially increase attorneys' fees and costs for Defendant in continuing to defend the action. This early Settlement avoids those risks to both sides. Given the delicate nature of class actions, the risks of maintaining this Action through trial are high.

Therefore, the benefits of settlement here far outweigh the risks of continued litigation.

iii. The Benefits Conferred by Settlement

The benefits afforded under the Settlement are adequate under the circumstances and provide significant relief to Settlement Class Members. As explained above, NutriBullet has agreed to provide a \$10 voucher to Settlement Class Members who submit a valid and timely Claim Form. *See* Agr. § IV.C. NutriBullet will further afford an extended warranty to all Settlement Class Members, regardless of whether they submit a Claim Form. *Id.* at § IV.F. Lastly, NutriBullet will make significant changes to its print and online materials concerning the product warranty rights. *Id.* at § IV.E.

It is axiomatic under contract law that a party is entitled to the benefit of the bargain. *KGM Harvesting Co. v. Fresh Network*, 36 Cal. App. 4th 376, 382 (6th Dist. 1995) ("The basic premise of contract law is to effectuate the expectations of the parties to the agreement, to give them the 'benefit of the bargain' they struck when they entered into the agreement."); *Nat'l Rural Telcoms. v. DIRECTV, Inc.*, 319 F. Supp. 1040, 1048 (C.D. Cal. 2003) (same); *see Coremetrics, Inc. v. AtomicPark.com, LLC*, No. C 04-0222 EMC, 2005 U.S. Dist. LEXIS 40484, at *20 (N.D. Cal. Dec. 7, 2020) (same). The same is true under the SBA. *Huu Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 818-19 (9th Cir. 2019). Where the buyer has accepted the goods, the measure of damages entitles the plaintiff to recover the equivalent of the benefit of the bargain (*id.*) which includes restitution

1 resulting from overpayment for a product due to failure to disclose material information at the time
2 of the transaction that would affect a buyer's perception of the value of the product (*id.* at 821).

3 This Action is predicated on the theory that Plaintiff and the Class Members did not receive
4 the product warranty they paid for. *See Emerging Issues in Noninjury Class Litigation Targeting*
5 *Product Lines*, 39 Tort & Ins. L.J. 137 (Fall 2003). The settlement award which affords Settlement
6 Class Members with a \$10 voucher per claim (Agr. § IV.D), and also includes an automatic
7 Extended Warranty compares very favorably to what Plaintiff could recover from himself and the
8 Class at trial.⁷

9 Similarly, as explained in *Colgan v. Leatherman Tool Group, Inc.*, “restitution under the
10 [CLRA and UCL] must be of a measurable amount to restore to the plaintiff what has been acquired
11 by violations of the statutes.” 135 Cal. App. 4th 663, 698 (2006). Plaintiff would likely only be able
12 to recover a small percentage of the cost of the products due to the alleged misrepresentation or
13 omission, i.e., the diminished value. Based on review of NutriBullet's website, its products for
14 which the voucher may be used⁸ appear to range in price from approximately \$34.99 to
15 approximately \$189.99 [*see* Ibey Decl., ¶ 11].⁹ *See also*, Compl., ¶ 22 (Plaintiff paid \$140.00 for
16 Defendant's NutriBullet Blender Combo); Lo Decl., ¶ 15.

17 The settlement voucher award here, valued at \$10.00 per Settlement Class Member,
18 represents a significant percentage of the cost of such products (ranging from approximately 5% to
19 28% of the product price). This is comparable to, or likely better than, the amount the Settlement
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21
22 ⁷ In *Bezdek*, for example, the Court granted final approval of a class settlement, finding the relief
23 afforded by the settlement of approximately \$8.44 per pair of footwear and injunctive relief, for up
24 to two pairs of shoes, was reasonable in relation to the uncertainty of success at trial and the non-
reversionary common fund. *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 351 (D.Mass. 2015).

25 ⁸ Vouchers are redeemable on NutriBullet's website for a purchase (excluding the purchase of parts)
26 that exceeds \$30.00 before shipping expenses and taxes. Agr. § IV(C).

27 ⁹ *See* <https://www.nutribullet.com>. Also, NutriBullet is in the process of providing confirmatory
28 discovery in the form of a list of Covered Products and the estimate average retail price of the
Covered Products, pursuant to Section VIII(A) of the Agreement.

Class Members could actually recover at trial, which likely only a small percentage of the cost of the products. *See e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. Jan. 9, 2008) (approving settlement that constituted 6% of maximum potential damages); *Jones v. Abercrombie & Fitch Trading Co.*, No. CV 15-0105 JGB (Ex), 2018 U.S. Dist. LEXIS 198001, at *17 (C.D. Cal. Nov. 19, 2018) (finally approving class action settlement where the total settlement amounted to “approximately 35% of the expected recovery”); *Holt v. Foodstate, Inc.*, No. 1:17-cv-00637-LM, Dkt. Nos. 29-13 and 42 (D.NH. Jan. 16, 2020) (finally approving nationwide product false advertising settlement where plaintiff’s expert offered testimony as to a price premium of 1-2% due to the alleged misrepresentation of “100% Whole Foods”). Additionally, all Settlement Class Members (regardless of if they submit a valid Claim Form) receive an Extended Warranty, which specifically addresses the harm Plaintiff alleges against Defendant for having violated the SBA and chilling warranty claims. Thus, this Settlement is a good result for the Settlement Class.

Plaintiff’s counsel are informed and believe that monetary relief in this case gives an adequate amount to the Settlement Class Members for their purchases of the past product without any prosecution of the case themselves and provides adequate injunctive relief to remedy the alleged violations of the SBA on Defendant’s warranty materials.

Thus, this Settlement achieves a great result at this early stage without the risks and inherent delays of an adverse jury verdict, trial decision, or potential appeals.

iv. The Experience and Views of Counsel

Although recommendations of counsel proposing the Settlement are not conclusive, the Court can properly take them under consideration, particularly if they have been involved in litigation for some period of time, appear to be competent, have experience with this type of litigation, and have commenced discovery. *See* 2 H. Newberg, *Newberg on Class Actions* § 11.47 (2d ed. 1985). Indeed, courts do not substitute their judgment for that of the proponents, especially when experienced counsel familiar with the litigation have reached a settlement. *See e.g., Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990). Nevertheless, courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. *See* Newberg

on Class Actions § 11.51; *In re Chicken Antitrust Litig.*, 560 F. Supp. 957 (N.D. Cal. 1980). In short, there is a presumption that negotiations were conducted in good faith.

The experience and views of proposed Class Counsel here warrant a preliminary finding by the Court that the settlement is fair, adequate, and reasonable. Plaintiff's counsel are qualified and highly experienced in consumer class action litigation, including with regard to SBA claims. Kazerounian Decl., ¶¶ 18-27; Ibey Decl., ¶¶ 13-22; Assassi Decl., ¶¶ 12-16. They have detailed knowledge of this case based on pre-lawsuit investigations regarding NutriBullet's business and practices (including its warranty cards and online forms), informal discovery with NutriBullet as part of mediation and additional extensive negotiations over several months, as well as negotiated confirmatory discovery from NutriBullet (*see* Agr. ¶ VIII). Ibey Decl., ¶ 7; Kazerounian Decl., at ¶¶ 8-10; *see also* Agr. at § I.G. Thus, the Parties' respective counsel are sufficiently aware of the potential benefits and risks of settlement compared to proceeding with litigation and have determined settlement to be in the best interest of the Settlement Class. As such, the Court should defer to the views of counsel and preliminarily approve the Settlement. Class Counsel believe that, under the circumstances, the proposed Agreement is fair, reasonable, and adequate.

v. Adequacy of Class Representatives and Class Counsel

"[T]wo criteria for determining the adequacy of representation have been recognized. First, the named representatives must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). In this case, the adequacy of representation requirement is satisfied. For settlement purposes, named Plaintiff, Roy Lo, requests to be preliminarily approved as the Class Representative. Plaintiff understands the obligations of serving as class representative, has adequately represented the interests of the putative class, and has retained experienced counsel. Lo Decl., ¶¶ 7-8.

The Plaintiff requests that Abbas Kazerounian and Jason A. Ibey of the Kazerouni Law Group, A.P.C., and Adib Assassi of Black Oak Law Firm, be confirmed as Class Counsel for Plaintiff and the Settlement Class for purposes of the Settlement. *See* Agr. § II.PP. As previously

1 discussed, Plaintiff's counsel have extensive experience sufficient to be appointed as Class Counsel
2 in this Action. Also, Plaintiff has no antagonistic or conflicting interests with the Class Members.
3 Lo Decl., ¶ 14. Finally, Plaintiff and Settlement Class Members seek the same relief for the same
4 violations NutriBullet has allegedly committed. *See* Compl., Prayer for Relief.; Agr. § IV.

5 No potential for conflicting interests exists considering the overwhelming similarity of
6 claims. Therefore, Plaintiff respectfully requests that he be appointed as Class Representative for
7 settlement purposes. Plaintiff also respectfully requests Abbas Kazerounian, Jason A. Ibey, and
8 Adib Assassi, be appointed as Class Counsel for settlement purposes.

9 **VI. THE FINAL APPROVAL HEARING SHOULD BE SCHEDULED**

10 The last step in the settlement approval process is the formal final approval hearing. Pursuant
11 to California Rules of Court, Rule 3.769(e), should the Court grant preliminary approval, its order must
12 state the time, date, and place of the final approval hearing. This hearing allows the Court to hear all
13 evidence and the arguments necessary to determine whether the settlement is fair, adequate, and
14 reasonable. The Court also determines whether a request for attorneys' fees, costs and service award
15 should be granted. Counsel for Plaintiff intend to file a separate motion for attorneys' fees and costs
16 and service award ("Fee Brief") prior to a final approval hearing (fairness hearing), and respectfully
17 request that the final approval hearing be held no earlier than 100 days from the date of an order
18 preliminarily approving the settlement (Agr. § IX.D.), in order to afford time for class notice, and
19 preparation of a Fee Brief as well as a motion for final class action settlement approval.

20 **VII. CONCLUSION**

21 In conclusion, Plaintiff respectfully requests that the Court enter an order: (1) preliminarily
22 approving the proposed Settlement; (2) providing the class notice; (3) appointing Plaintiff Roy Lo as
23 Class Representative for settlement purposes; (4) appointing attorneys Abbas Kazerounian, Jason A.
24 Ibey, and Adib Assassi as Class Counsel for settlement purposes; and (5) scheduling a final approval
25 hearing no earlier than 100 days after an order preliminarily approving the settlement. A proposed
26 preliminary approval order is submitted herewith (see also, Exhibit E to Agreement).

1 Dated: April 15, 2022

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2
3 By: 
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