FARNESE P.C.
Peter J. Farnese (SBN 251204)
700 S. Flower St., Suite 1000
Los Angeles, California 90017
Telephone: 310-356-4668
Facsimile: 310-388-1232
Email: pjf@farneselaw.com

Attorneys for Plaintiff

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF SOLANO

DANIELLE SKARPNES, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

ELIXIR COSMETICS OPCO, LLC,

Defendants.

CASE NO. CU23-04638

Assigned for All Purposes to the Hon Tim P. Kam, Dept. 7 (effective January 1, 2024)

CLASS ACTION

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

[Declarations of Peter J. Farnese; Declaration of Mark Schey; and [Proposed] Order filed concurrently herewith]

Date: May 20, 2024
Time: 9:00 a.m.
Dept: 7

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

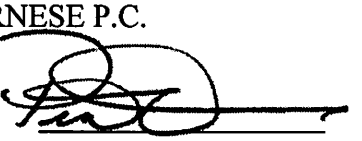
PLEASE TAKE NOTICE that on May 20, 2024, at 9:00 a.m. in Department 7 of the above-entitled Court, Plaintiff Danielle Skarpnes, individually and on behalf of all other similarly situated, pursuant to California Rule of Court 3.769 and the Court's preliminary approval order, will, and hereby does, move the Court for entry of an order: 1) granting final approval of the proposed class action settlement; 2) Confirming the order certifying, for settlement purposes, a Settlement Class; 3) Confirming the appointment of Plaintiff, for settlement purposes, as Class Representative; 4) Confirming the appointment, for settlement purposes, of Farnese PC as Class Counsel; 5) Granting Class Counsel's application for an award of attorneys' fees and costs; 6) Granting Plaintiff's application for a service award; and 7) Entering the Final Approval Order and Judgment with continuing jurisdiction as provided in the [Proposed] Final Approval Order and Judgment.

This motion is based on this notice, the declarations of Peter J. Farnese, Mark Schey, the accompanying memorandum of points and authorities, on the complete files and records in this action, and on such further oral and documentary evidence which may be submitted at the hearing, and upon any further evidence the Court may receive.

Respectfully submitted,

DATED: May 6, 2024

FARNESE P.C.

By: 

Peter J. Farnese

Attorneys for Plainitff and the Settlement Class

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

This Settlement[1] is an exceptional result for the Settlement Class and more than meets the standard for final approval. After completion of the Court-approved, nationwide notice program, it is evident that the Settlement Class overwhelmingly and uniformly approves of the Settlement terms. Only seven class members have requested to be excluded from the Settlement, and none have submitted a timely objection[2]. The Settlement Administrator advises that all approved Claimants will receive at least $25 each—50% of the full retail price of the most popular sized Product ($49) and the full amount represented in the Motion for Preliminary Approval that Claimants could receive. Meanwhile, Claimants with proof of purchase (or located in Defendant's records) will receive even more-- $25 for each unit claimed. In other words, and as discussed herein, all claimants will receive a cash payments that almost certainly exceeds their recovery if Plaintiff prevailed at trial.

There can be no legitimate dispute that this Settlement is more than a fair deal for the Class. Namely, the Settlement provides:

- **Non-Reversionary Fund for Cash Payments and Administration:** A total Settlement Fund of over $2.6 million consisting of a cash fund of $2.3 million and separate payment of all notice and administration costs of $300,000 plus postage. Settlement Class members who submit valid and timely claims with proof of purchase or who appear in Defendant's purchase records will receive compensation of $25.00 per unit of the Products purchased. Class Members without proof of purchase can receive $25.00 per household.

- **Labeling & Advertising Changes:** Defendant will modify its advertising and labeling for the Products with respect to the ingredient ICP to provide clear and prominent disclosures and additional warning and safety information.

---

[1] The fully executed settlement agreement ("Settlement" or "Settlement Agreement") is attached as Exhibit 1 to the Declaration of Peter J. Farnese ("Farnese Decl."). Unless otherwise noted, all capitalized terms have the meaning assigned to them in the Settlement Agreement.

[2] On April 30, 2024, after the deadline for claims, opt-outs, and objections had passed, Class Counsel became aware of an attorney who had sent a demand letter in late February 2024 to Defendant regarding the Products (over a month after the Court granted preliminary approval). That day, Defendant advised the attorney that her demanded relief was covered by this Settlement and the attorney responded that she intended to object to the Settlement. As of May 5, 2024, no objection has been submitted and the Plaintiff is not aware of the intended basis of the objection.

- **Class Notice Program and Simple Claims Process:** A comprehensive class notice program, consisting of direct email and mail notice, publication, and a settlement website. A streamlined claims process where Settlement Class Members may submit claims online and need not provide proof of purchase to receive a cash payment.

- **Narrowly Tailored Release**: Class Members do not release personal injury or disease claims, whether existing or unknown, in the Settlement.

- **No "Clear Sailing" Provision or Reversion:** There is no "clear sailing" provision for Plaintiff's fee and cost application. Fees will be determined by the Court and there is no reversion of Settlement fund as all remaining monies in the Net Settlement Fund will be distributed *pro rata* to claimants.

In short, the combination of cash refunds and injunctive relief not only fulfills the objectives of this litigation, but also provides real, immediate, and meaningful relief for the Settlement Class. When judged against the specific risks of continued litigation, particularly Defendant's argument that Plaintiff's state law claims are preempted by the Federal Food, Drug & Cosmetic Act as discussed in the Ninth Circuit's recent decision in *Nexus Pharms., Inc. v. Central Admixture Pharm. Servs., Inc.*, 148 F. 4th 1040 (9th Cir. 2022), the proposed Settlement is a homerun.

As described herein, in all respects the Settlement is fair, adequate and reasonable, and readily meets the standard for final approval. Plaintiff respectfully requests that the Court confirm certification of the Settlement Class and grant final approval of the Settlement.

II. BRIEF SUMMARY OF SETTLEMENT TERMS

A. Cash Settlement Fund, Class Notice and Administration.

Defendant will establish a $2,300,000 non-reversionary Cash Settlement Fund to provide for Settlement Class Members who make timely and valid claims for Cash Benefits, Class Representative Service Payments, and Plaintiffs' Counsel's Fees and Expenses. Farnese Decl. at ¶7. On top of the Cash Settlement Fund, Defendant will separately pay all notice and administration expenses up to $300,000 (plus any additional postage). *Id.* Thus, the Total Settlement Fund provided by the Settlement is $2.6 million. The Settlement Administrator has advised that notice and administration costs to date are $340,071.77, including postage. *Id.* at ¶8. In other words, Defendant will pay at least $2,640,071.77 in this Settlement, plus any additional postage to complete the administration. *Id.*

Authorized Claimants located in Defendant's records or who provide a Proof of Purchase are eligible to claim a Cash Benefit of up to $25.00 per unit of Products purchased. *Id.* at ¶9. Authorized Claimants without a Proof of Purchase are limited to a maximum Cash Benefit of up to $25.00 per household. *Id.* The Settlement Administrator reviewed Claim Forms for validity and indications of fraud using ClaimScore. *Id.*

B. Advertising and Labeling Changes.

Within sixty (60) days after the Settlement Date, Defendant will make the label changes reflected in Exhibit F to the Settlement Agreement to Products currently in production, along with changes to Defendant's website and training contemplated by Exhibit F. *Id.* at ¶10. Specifically, Defendant will modify its outer packaging, product insert, and website with Expanded Warning Statements, Expanded Instructions, and New Ingredient Declarations. *Id.* at A1 – A3. These expanded statements identify the presence of isopropyl cloprostenate ("ICP"), that ICP is a prostaglandin analog, and disclose side effects associated with prostaglandin analogues, like ICP. *Id.*

C. Class Release

As consideration for the benefits provided by the Settlement, the Settlement Class will provide Defendant and the Released Parties with a release of claims that were made or could have been made in the Action regarding the Products. The Release by Plaintiff and the Settlement Class is set forth in Article 3.1 of the Settlement Agreement. Personal injury claims are excluded from the Release. *Id.* at Art. 3.1. ("Specifically excluded from the release are individual personal injury or disease claims, including existing claims, as well as latent or unknown individual personal injury or disease claims, held by Settlement Class Members.").

D. Attorneys' Fees, Costs, and Class Representative Service Award

On March 20, 2024, Plaintiff filed an application for an award of the attorneys' fees and costs, and service award to Plaintiff. *Id.* at ¶16. The Parties have no agreement (and have not discussed) the amount of attorneys' fees, except that Defendant agrees to pay the amount of attorneys' fees and costs awarded by the Court. Settlement Agreement at §2.5. Any awards of attorneys' fees and costs and service award to Plaintiff will be paid out of the Settlement Fund. *Id.* §2.4 - 2.5.

III. PRELIMINARY APPROVAL, CLASS NOTICE AND ADMINISTRATION

A. Preliminary Approval

Plaintiff filed the Settlement with Court on November 9, 2023. *Id.* at ¶14. On January 19, 2024, the Court granted preliminary approval of the proposed Settlement and ordered the Parties and the Settlement Administrator to commence the nationwide class notice program. *Id.* The Court set the final approval hearing, as well as the hearing on Plaintiff's motion for award of attorneys' fees and costs, for May 20, 2024. *Id.*

B. The Court-Ordered Notice Plan, Settlement Website, and Toll-Free Telephone

The parties retained, and the Court appointed, AI Class Solutions ("AICS"), a court-recognized legal notice and claims administration firm, as Settlement Administrator. *See* Declaration of Mark Schey ("Schey Decl.") at ¶1. The Settlement Website was set up to ensure that class members could receive and review all of the relevant information pertinent to the Settlement, including the class notices, claim form, settlement agreement, operative complaint, preliminary approval order, and answers to frequently asked questions. *Id.* at ¶¶35-36. On February 19, 2024, the class notice program commenced. *Id.* at ¶19. The notice plan consisted of 1) a direct email notice to 308,857 class members; 2) postcard notices to 37,943 class members; 3) a targeted internet notice program; 4) print publication; and 5) the creation of the Settlement Website. *Id.* at ¶¶6-39. In addition, a settlement email address, P.O. Box, and toll-free telephone number (IVR) were established. *Id.* at ¶4, 7.

As described in detail in the Declaration of Mark Schey, the multifaceted notice program was designed to reach at least 70% of Settlement Class. *Id.* at ¶¶8-10, 59. The internet notice ran on targeted sites, including "Tier 1" properties (such as Verizon, Google, and Facebook) per the Settlement Agreement and generated 22,198,230 impressions. *Id.* at ¶¶24-31, 54. With respect to the internet notices, AICS states that "[b]ehaviors, interests, and topics were used to target the notice in the most efficient manner. For example, targeting included adults in the United States who are known to have purchased 'beauty' products, including Elixir beauty products." *Id.* at ¶32. AICS designed the notice advertisements to "command class members' attention" and were "written in a clear, concise and easily understood language." *Id.* at ¶33. Om March 19 and April 5, 2024, AICS issued "reminder" email notices to all Class Members with known emails who had not yes submitted a claim. *Id.* at ¶¶20-

21. Finally, to comply with the California CLRA, a print publication notice was published in *USA Today – California Regional Edition* , beginning on February 19, 2024. *Id.* at ¶¶53. AICS reports that the Settlement Website received over 3 million visits; the toll-free number received 164 inbound calls; the Settlement email address received 505 incoming emails and 482 outgoing responses; and AICS mailed out 57 mailers which included the Claim Form via postal mail and email. *Id.* at ¶55(a)-(g).

C. Claims, Opt-outs, and Objections

As of May 6, 2024, AICS has processed and approved 28,093 claims. *Id.* at ¶55(g). In addition, as of May 6, 2024, AICS has received seven requests for exclusion. *Id.* at ¶42-43; Ex D. As of May 6, 2024, AICS has received no objections. *Id.* at ¶41, 55(e). AICS is still receiving mail-in claims that were postmarked prior to the April 19, 2024, deadline and will continue to enter and process those as they are received. *Id.* at ¶56.

IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

Rule 3.769 of the California Rules of Court sets forth the procedures for settlement of class actions in California. *Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2009). A two-step process is required. First, the court preliminarily approves the settlement and the class members are notified as directed by the court. Cal. Rules of Court, rule 3.769(c)–(f). Second, the court conducts a final approval hearing to inquire into the fairness of the proposed settlement. Cal. Rules of Court, rule 3.769(g). At final approval, the trial court confirms its preliminary determination "whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35; *see also In re Microsoft I–V Cases* (2006) 135 Cal.App.4th 706, 723; and *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.

California courts favor settlement, particularly in class actions and other complex cases in which substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *See In re Microsoft*, 135 Cal.App.4th at 723 n. 14 ("Public policy generally favors the compromise of complex class action litigation."); *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1151; *Stambaugh v. Sup. Ct.* (1976) 62 Cal.App.3d 231, 236. Thus, in reviewing a class action settlement, "[d]ue regard . . . should be given to what is otherwise a private consensual

agreement between the parties." *7-Eleven Owners*, 85 Cal.App.4th at 1145.

The trial court should not "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Id.* at 1145. As such, "the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits" of Plaintiff's claims. *Id.*; *see also Wershba*, 91 Cal.App.4th at 246. The focus is on whether the proposed settlement is fair, reasonable, and adequate under the circumstances of the case. *See In re Microsoft*, 135 Cal.App.4th at 723; *see also Dunk*, 48 Cal.App.4th at 1801. Here, the Settlement is indisputably fair, providing substantial benefits to the Settlement Class, as well as the general public.

A. The Settlement Is Commensurate with the Court-Approved Settlement in *Lash Boost Cases*

Before addressing the specific fairness factors, it should be noted that the amount of the Settlement Fund and provisions of the injunctive relief match the court-approved settlement in a nearly identical class action involving a lash serum formulated with ICP. *See Lash Boost Cases* (JCCP No. 4981), Final Approval Order attached to Farnese Decl. as Ex. 3. Judge Ethan P. Schulman of the Complex Division of the Superior Court of California, County of San Francisco, granted final approval of the proposed class settlement in *Lash Boost Cases,* which resolved years-long litigation of multiple actions in California state and federal courts prosecuted by multiple leading consumer class action firms. The *Lash Boost Cases* settlement created a $30 million cash settlement fund and $8 million fund of purchase credits. *Id.* ¶50. In addition to the monetary relief, Judge Schulman approved injunctive relief which expanded with warnings and disclosures for the Lash Boost products regarding the ICP ingredient. Comparing the total sales at issue in *Lash Boost Cases* (which involved substantially higher sales and higher priced products than those at issue here) to the sales at issue here, demonstrates that the amount of the Cash Settlement Fund is proportional to the amount of the cash fund in the court-approved *Lash Boost Cases*. *Id.* ¶51. Likewise, the proposed disclosures and warnings secured by the injunctive relief here also track those approved in the *Lash Boost Cases* settlement. Thus, the fairness of the Settlement is further supported by the fact that a proportional Settlement Fund amount and similar injunctive relief have already been given final approval by another California Superior Court.

B. The Settlement Is Entitled to a Presumption of Fairness

"[A] class action settlement is presumed to be fair [where]: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Chavez v. Netflix, Inc.*, (2008) 162 Cal.App.4th 43, 52-53; *Kullar v. Foot Locker Retail, Inc.*, (2008) 168 Cal.App.4th 116, 128.

Plaintiff addressed the first three factors in her preliminary approval motion and nothing has occurred which changes that analysis. *See* Preliminary Approval Motion at p. 8-9. As to the last factor, the objection deadline has passed and no timely objections have been submitted. Only seven requests for exclusion have been received. In the case of few opt-outs and/or objectors, courts have held that such settlements are fair and adequate. *See Chavez*, 162 Cal.App.4th at 53; *7-Eleven Owners*, 85 Cal.App.4th at 1152-53 (8 out of 5,454 class members objecting). Accordingly, this factor weighs heavily in favor of settlement approval and the Court should confirm that the "presumption of fairness" applies in this case.

C. The Settlement Remains Fair, Adequate, And Reasonable In Light of the Parties' Respective Legal Positions

In assessing the fairness of a settlement, the court may consider several factors, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *In re Microsoft*, 135 Cal.App.4th at 723.

All factors confirm the Court's preliminary finding that the Settlement is fair, adequate, and reasonable such that final approval is warranted.

1. The Strength Of Plaintiff's Case And The Risk, Expense, Complexity And Likely Duration Of Further Litigation

The Court should weigh the risk inherent in continued litigation against the immediacy and certainty of substantial settlement proceeds. *See Dunk*, 48 Cal.App.4th at 1801-02; *Wershba*, 91

Cal.App.4th at 250-51. Although Plaintiff believes that the case against the Defendant is strong, such confidence must be tempered by the fact that the Settlement is extremely beneficial (providing a significant immediate return) and that there were significant risks of less or no recovery, particularly in a complex case such as this one. *See* Farnese Decl. at ¶¶42-49.

As the Court previously found at preliminary approval, Plaintiff would have faced risks at class certification, summary judgment, and trial. Defendant strongly denies Plaintiff's allegations and, through its experienced counsel, would present a vigorous defense at class certification and trial (and any appeals). Most pointedly, Defendant planned to argue that Plaintiff's claims that the Products are misbranded and unapproved drugs (and that Defendant failed to adequately advise consumers of the presence of ICP in the Products along with the side effects associated with prostaglandin analogues like ICP) are an improper attempt by a private plaintiff to enforce the FDCA and are preempted.

While the Federal Circuit in *Allergan, Inc. v. Athena Cosmetics, Inc.*, (Fed. Cir. 2013) 738 F.3d 1350 previously affirmed a California court's determination that similar lash serums formulated with ICP were sold in violation of the California consumer protection laws, Defendant argues that the recent case of *Nexus Pharmaceuticals, Inc. v. Central Admixture Pharmacy Services, Inc.*, (9th Cir. 2022) 48 F. 4th 1040 calls the *Allergan* decision into question and confirms that Plaintiff's claims are preempted. In *Nexus*, the Ninth Circuit stated that "[*Allergan*], misinterprets our case law regarding the bar on private enforcement [of the FDCA]." *Id.* at 1049. Of course, Plaintiff disagrees with Defendant on the scope and applicability of *Nexus*, Defendant's argument could have resulted in either dismissal or greatly narrowing Plaintiff's claims at the pleading stage. This possibility was very real as other trial courts have applied *Nexus* to dismiss other cosmetics class actions. *See, e.g., Wilson v. Colourpop Cosmetics, LLC* (N.D.Cal. Sep. 6, 2023, No. 22-cv-05198-TLT) 2023 U.S.Dist.LEXIS 185688 (dismissing cosmetics action as preempted by FDCA). This trend toward preemption has continued as the Supreme Court, on April 15, 2024, denied certiorari in an action seeking to overturn the First Circuit's decision in *DiCroce v. McNeil Industries*, (1st Cir. 2023) 82 F. 4th 35, which found allegations that a product was a drug that was being deceptively marketed as a dietary supplement as impliedly preempted.

Setting aside these threshold issues, Plaintiff faced uncertainty in prevailing on the merits of

her claims. In particular, given that a history of scientific and safety testing for ICP exists, there is no guarantee that the testimony of Plaintiff's experts would have been accepted over that from Defendant and its experts on the validity and applicability of the science—as well as a host of other issues, including whether Defendant's advertising and labeling is misleading, and the measurement of any "price premium" attributable to Plaintiff's claim that Defendant failed to adequately disclose certain side effects associated with ICP. Farnese Decl. at ¶¶42-49. Accordingly, this factor weighs in favor of final approval.

2. The Risk of Maintaining Class Action Status Through Trial

Although this case was brought as a class action, there is no guarantee that it will obtain, let alone retain, class action status. Plaintiff is confident that Defendant's business practices and advertising of the Products presented common misrepresentations to consumers that were certifiable as a class action, but Defendant could present evidence that consumers rely on a host of factors and representations when deciding to buy the Products, which could defeat a finding of commonality or typicality at class certification. Moreover, even if class certification were granted in this matter, motions for decertification can be brought anytime. *See Washington Mutual Bank v. Sup. Ct.*, (2001) 24 Cal. 4th 906, 927. Thus, there is a risk the Settlement Class could lose at trial and recover nothing. *See, e.g., Allen v. Hyland's, Inc.,* (C.D. Cal. Feb. 23, 2021No. CV 12-1150-DMG (MANx)), 2021 U.S. Dist. LEXIS 34695; *Racies v. Quincy Bioscience, LLC,* (N.D. Cal. May 4, 2020 No. 15-cv-00292-HSG), 2020 U.S. Dist. LEXIS 78156 (declaring mistrial and decertifying class); and *Bustamante v. KIND, LLC* (2d Cir. May 2, 2024, No. 22-2684-cv) 2024 U.S. App. LEXIS 10694 (affirming trial court's order granting defendant's motions for summary judgment, to decertify the classes, and to exclude plaintiffs' expert witnesses).

3. The Amount Offered in Settlement

To be considered fair and reasonable, a proposed class action settlement does not have to provide 100 percent of the possible damages that could be recovered if the case ultimately was tried to a successful conclusion. *See Wershba*, 91 Cal.App.4th at 250 ("Compromise is inherent and necessary in the settlement process. Thus, even if 'the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,' this is no bar to a class

settlement because 'the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.'"). Rather, a settlement is considered against the backdrop of the facts and circumstances surrounding a particular case. *See id.* at 246-50. Both the total amount of the settlement fund and the individual recovery per claimant are fair, reasonable and adequate.

a. Cash Benefit

First, the Settlement Fund (along with the class notice and administration expenses) totaling over $2.6 million is fair, adequate, and reasonable. As discussed above, based on the sales of the Products, the amount of the Settlement Fund is commensurate with the size of the fund that was granted final approval in the *Lash Boost Cases* in September 2022. *See* Farnese Decl. ¶¶50-54, Ex. 3. The amount of the Settlement Fund supports final approval.

Second, claimants' individual recovery ($25 per unit) is an exceptional outcome and is very likely more than consumers could obtain even if they prevailed at trial. *See, e.g., Broomfield v. Craft Brew All., Inc.*, (N.D. Cal. Feb. 5, 2020 No. 17-cv-01027-BLF), 2020 U.S. Dist. LEXIS 74801, at *26-28 (assessing fairness of the settlement amount in terms of the "per-unit monetary relief"). Even if Plaintiff was successful in establishing liability, calculation of restitution and damages would not amount to a return of the full purchase price for the Products. *See Korea Supply Co. v. Lockheed Martin Corp.*, (2003) 29 Cal.4th 1134, 1149; *Shersher v. Sup. Ct.*, (2007) 154 Cal.App.4th 1491, 1498. For instance, damages under the CLRA (and other state consumer protection laws for that matter) are measured as the difference between the price paid and what the market value would have been had the disclosures been made. *See Colgan v. Leatherman Tool Grp., Inc.* (2006) 135 Cal. App. 4th 663, 675 ("[a]ctual damage" under the CLRA is "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received."). Plaintiff may only recover restitution under UCL and FAL claims. *Korea Supply Co.,* 29 Cal. 4th at 1144. Restitution must consider the value received by class members in the form of the purchased product. *See, e.g., In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 792, 794. As such, a consumer may receive a full refund only if she "received no value" from the product. *Tobacco II*, 240 Cal.App.4th at 802; *accord Chowning v. Kohl's Dept. Stores, Inc.* (9th Cir. 2018) 733 F.App'x. 404, 405-06.

Although Plaintiff is confident in the merits of her claims that the Products are worthless for the advertised purposes and as unapproved drugs, Class Counsel recognizes that courts in California have limited the application of such damage models for consumer protection law claims. In *Tobacco II,* the court rejected a full-refund remedy for deceptively advertised "Light" cigarettes because class members still received value from smoking the cigarettes—even though the cigarettes would not deliver the promised lower tar and nicotine. *Tobacco II*, 240 Cal. App. 4th 779, 787-88 (noting that the record showed that many class members valued the "taste and smoothness" of the Lights cigarettes, even if the Lights lacked any health benefit). Moreover, courts routinely deny class certification under the "full refund" theory where a plaintiff cannot demonstrate that the product was completely worthless. *See, e.g., Ang v. Bimbo Bakeries USA, Inc.*, (N.D. Cal. Aug. 31, 2018), No. 13-cv-01196-HSG, 2018 U.S. Dist. LEXIS 149395, at *34)("In this Circuit, courts have consistently declined to apply the full-refund method of calculating restitution where a plaintiff cannot show that the product she purchased or consumed was worthless." (citation omitted)).

Plaintiff likely would have been limited to a recovery in the amount of the price premium—i.e., the percentage of the purchase price representing the difference between the actual purchase price and the value of the product if Defendant had not omitted to disclose the Products' potential side effects. Class Counsel worked as co-counsel in the *Lash Boost Cases* and at the time of class certification in those matters, the initial estimates from the damages expert retained by the plaintiffs suggested that the maximum price premium that could reasonably have been achieved would have been approximately 25% of the purchase price. Farnese Decl. ¶47. Here, Defendant's most popular sized Product retails for $49.00. *Id.* Thus, the maximum price premium may amount to $12.25. Under that analysis, the Settlement provides claimants with approximately double the maximum price premium.

But, Plaintiff obtained sales information showing that Defendant primarily sold the Products through third party retailers and therefore received substantially less than the purchase price from retailers for the Products. *Id.* at ¶48. So, in addition to subtracting the costs to manufacture the Products, Defendant would argue that the starting point to Plaintiff's "price premium" should not be the retail price, but rather the price that Defendant actually received. *Id.* In that scenario, the price premium would be substantially less than the $25 per unit settlement benefit. *Id.*

In sum, if Defendant successfully argued that the Products are not completely worthless, continued litigation or even a trial verdict in Plaintiff's favor very well would have resulted in the return of less than the $25.00 per unit benefit provided by the Settlement here. Thus, the Cash Benefit is more than just a fair result, it is exceptional—as has been confirmed by the universally positive reaction and participation by Class Members in claiming the Settlement benefits.

b. Injunctive Relief

Last, the injunctive relief is a noteworthy achievement to provide consumers with substantially more information about the Products and the nature of ICP. *See, e.g., Broomfield,* 2018 U.S. Dist. LEXIS 149395 at *34 (noting that the settlement amount includes injunctive relief to the product packaging). The updated disclosures and warnings track what was approved in the *Lash Boost Cases.* Farnese Decl. at ¶50. Courts have recognized that "there is a high value to the injunctive relief [resulting] in [n]ew labeling practices" because such relief confers benefits not just to Class Members, but to "the marketplace and competitors who do not mislabel their products." *Bruno v. Quten Research Inst., LLC,* (C.D. Cal. Mar. 13, 2013 No. SACV 11-00173 DOC(Ex)), 2013 U.S. Dist. LEXIS 35066, at *10.

In conclusion, the Settlement achieves Plaintiff's primary objectives in litigation: (1) monetary compensation to consumers misled into purchasing the Products based on the inadequate and deceptive disclosures related to ICP; and (2) a change in Defendant's business practices that will ensure transparency in the marketing and labeling of the Products going forward. Accordingly, this factor heavily weighs in favor of finding the relief obtained is fair, adequate, and reasonable, and granting final approval of the Settlement Agreement.

4. The Extent of Discovery Completed and the Stage of Proceedings

"In the context of class action settlements, as long as the parties have sufficient information to make an informed decision about settlement, 'formal discovery is not a necessary ticket to the bargaining table.'" *Wilson v. Tesla, Inc.*, (N.D. Cal. July 8, 2019 No. 17-cv-03763-JSC), 2019 U.S. Dist. LEXIS 112866, 2019 WL 2929988, at *8 (quoting *Linney v. Cellular Alaska P'ship*, (9th Cir. 1998) 151 F.3d 1234, 1239). As the court found at preliminary approval, Class Counsel is experienced in class litigation and possessed all information necessary to evaluate the case (including

relevant sales information) in order to determine the contours of the Settlement Class and reach a fair and reasonable compromise. Farnese Decl. at ¶¶33-41 (discussing counsel's investigation and discovery). Here, "the parties entered the settlement discussions with a substantial understanding of the factual and legal issues from which they could advocate for their respective positions." *Spann v. J.C. Penney Corp.*, (C.D. Cal. 2016) 211 F. Supp. 3d 1244, 1256; *see also Taafua v. Quantum Glob. Techs., LLC*, (N.D. Cal. Feb. 16, 2021 Case No. 18-cv-06602-VKD) 2021 U.S. Dist. LEXIS 28754, at *19 (finding counsel possessed sufficient information from their background investigation, informal discovery, and settlement discussions in reaching early settlement prior to formal discovery). Class Counsel acted quickly and efficiently in obtaining adequate information to secure a fair and reasonable Settlement. *See Dunk*, 48 Cal.App.4th at 180. Accordingly, this factor weighs in favor of final approval.

5. The Experience and Views of Counsel

Courts may also look to "the experience and views of counsel" as one factor favoring approval of a proposed class settlement. *Kullar* 168 Cal.App.4th at 128 (internal quotation marks and citation omitted). Class Counsel's endorsement is entitled to great weight. *See Nat'l Rural Tele. Coop. v. DIRECTV, Inc.*, (C.D. Cal. 2004) 221 F.R.D. 523, 528 ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."). Here, Class Counsel has significant experience in litigating cosmetics class actions generally, and matters involving lash serum products specifically, including as co-class counsel in the *Lash Boost Cases* action. Farnese Decl. at ¶¶33-41. Class Counsel favor the Settlement and believe it is in the best interest of the Class. This factor weighs in favors final approval.

6. The Presence of a Governmental Participant

This factor is inapplicable because there is no government participant in this case.

7. The Reaction of Class Members

Class members have indicated an overwhelmingly positive response and support for the Settlement. A low percentage of opt-outs in comparison to the overall class size weighs in favor of approval of settlement. *See Chavez*, 162 Cal.App.4th at 53 (finding settlement fair and reasonable where 1,234 members, or 0.2 percent of the class, opted out); *7-Eleven Owners*, 85 Cal.App.4th 1152-

53 (approving settlement and stating that response of absent class members was "overwhelmingly positive" where only 1.5 percent elected to opt out). Here, only seven class members out of an estimated 900,000 have submitted requests for exclusion and there are no timely objections. The reaction of class members indicates an endorsement of the Settlement and supports final approval.

V. THE COURT SHOULD CONFIRM CERTIFICATION OF THE SETTLEMENT CLASS

In connection with preliminary approval of the Settlement, the Court certified, for settlement purposes, the Settlement Class. *See* Preliminary Approval Order at ¶2. The Settlement Class has not changed since preliminary approval and the criteria for class certification, namely an ascertainable class, adequacy of representation, superiority, and a well-defined community of interest, remain satisfied. *See, e.g.,* Cal. Code Civ. P §382; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429; *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 . Accordingly, the Court should confirm its order certifying the Settlement Class. *See, e.g., Adoma v. Univ. of Phoenix, Inc.*, (E.D. Cal. 2012) 913 F. Supp. 2d 964, 974 (The Court "need not find anew that the settlement class meets the certification requirements [.]")

VI. THE CLASS WAS PROVIDED WITH ADEQUATE NOTICE

In assessing notice in a class action settlement, "[t]he standard is whether the notice has a 'reasonable chance of reaching a substantial percentage of the class members.'" *Wershba*, 91 Cal.App.4th at 251. However, it is not necessary to show that notice reached each member of a nationwide class. *Id.* Moreover, the Court has a great deal of discretion in applying this standard. *See Chavez*, 162 Cal.App.4th at 57 ("[T]he manner of giving notice is subject to the trial court's virtually complete discretion.").

As the Court already determined at preliminary approval, the class notice plan for this action more than meets the applicable due process requirements. *See Ford v. CEC Entm't Inc.*, (S.D. Cal. Dec. 14, 2015) 2015 WL 11439033, at *3 (notice satisfied when administrator complies with preliminary approval order). The proposed class notices, as the Court previously found, met all of the "plain language" requirements and were based on the Federal Judicial Center's ("FJC") guidelines and model forms for notice of pendency of a class action. *See* Schey Decl. at ¶¶8, 57-60. In a neutral and

objective manner, each of the proposed class notices informed Class Members of their eligibility, options for opting-out or objecting to the Settlement, the date and location of the Final Approval Hearing, the salient terms of the Agreement, and how to obtain additional information. *Id.* at ¶¶8-9, 60. These notices were more than "adequate to fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." *7-Eleven Owners* (2000) 85 Cal.App.4th at 1164.

The class notice plan was excellent and handily met all requirements to fulfill due process. The notice plan, which was developed with the expertise of AICS, included the following elements: (a) direct email and mail notice; (b) internet publication notice; (c) a print notice; and (d) Settlement Website. *Id.* at ¶¶12-39; Farnese Decl. at ¶¶55-64. AICS initiated 308,857 direct email notices and 37,943 postcard notices to Class Members. *Id.* at ¶¶16-19. For any Class Member who lacked a valid email address or if the email "bounced back," AICS mailed a postcard notice where the physical address was known. *Id.* at ¶18. For Class Members whose contact information was not known, the publication notice program widely disseminated online and through a print publication. Altogether, the notice complied with the preliminary approval order and reached over 70% of the Settlement Class required to satisfy due process. *Id.* at ¶¶59-60. *See Free Range Content, Inc. v. Google, LLC*, (N.D. Cal. Mar. 21, 2019 No. 14-cv-02329-BLF), 2019 WL 1299504, at *6 ("Notice plans estimated to reach a minimum of 70 percent are constitutional and comply with Rule 23." (quotations omitted)). A 70% reach is consistent with due process and the Federal Judicial Center's published Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (2010). Accordingly, the Settlement Class received adequate notice of the Settlement.

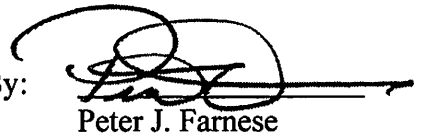
VII. CONCLUSION

Plaintiff respectfully submits that the proposed Settlement is fair, adequate, and reasonable. Settlement Class Members have indicated overwhelming positive support for the Settlement. The proposed Settlement is in the best interests of the Settlement Class in light of the risks in continued litigation. Accordingly, Plaintiff requests that the Court issue an order granting final approval.

Respectfully submitted,

DATED: May 6, 2024

FARNESE P.C.

By: 
Peter J. Farnese

Attorneys for Plainitff

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of LOS ANGELES, State of CALIFORNIA. I am over the age of 18 and not a party to within action; my business address is 700 S. Flower St., Los Angeles, California 90017.

On May 6, 2024, I served the foregoing documents described as:

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

On interested parties in this action by sending a true copy of the document to the following parties as follows:

Thomas J. Cunningham
tcunningham@lockelord.com
Daniel A. Solitro
dsolitro@lockelord.com
LOCKE LORD LLP
300 S. Grand Avenue, Suite 2600
Los Angeles, CA 90071
Tel: (213) 485-1500
Fax: (213) 485-1200

Counsel for Defendant Elixir Cosmetics OPCO, LLC

xxxx (By ELECTRONIC MAIL) I caused the document(s) to be successfully transmitted via electronic mail to the offices of the addressees.

------ (By FACSIMILE) I transmitted pursuant Rule 2.306, the above-described document by facsimile machine (which complied with Rule 2003(3)), to the attached listed fax number(s). The transmission originated from facsimile phone number (310) 388-1232 and was reported as complete and without error.

------ (By OVERNIGHT DELIVERY) I caused such envelope(s) thereon fully prepaid to be placed in the Federal Express box at Los Angeles, California.

------ (BY PERSONAL SERVICE) I caused such envelope(s) to be hand delivered to the offices of the addressees.

------ (By U.S. FIRST CLASS mail) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

Executed on May 6, 2024 at Los Angeles, California.

xxxx (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

------ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Peter J. Farnese