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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**TRACY DAVIS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,**

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

Lead Case No.:
3:15-CV-00498-BEN-BGS

Case Consolidated with:
3:15-CV-00214-BEN-BGS

THIS DOCUMENT RELATES TO:
ALL CASES

**NOTICE OF MOTION AND
UNOPPOSED MOTION FOR
ORDER GRANTING
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

**TIFFANY LAPUEBLA,
INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY
SITUATED,**

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

Date: March 14, 2016

Time: 10:30 a.m.

Courtroom: 5A

Judge: Hon. Roger T. Benitez

TO ALL PARTIES AND THEIR COUNSEL OF RECORD, PLEASE
TAKE NOTICE that on March 14, 2016 at 10:30 a.m. in Courtroom 5A of the
above captioned Court, the Honorable Roger Benitez presiding, Plaintiffs Tracy
Davis and Tiffany Lapuebla (“Plaintiffs”), on behalf of themselves and all others
similarly situated, will and hereby do move the Court for an Order:

1. Granting preliminary approval of the Settlement Agreement reached by the parties;
2. Approving the proposed notice to Settlement Class Members;
3. Establishing a schedule for dissemination of the notice of settlement to Settlement Class Members, as well as the deadlines for Settlement Class Members to submit objections to or request exclusion from the settlement; and
4. Setting a hearing for final approval of the settlement.

This motion is brought pursuant to Fed. R. Civ. P. 23(e) and is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities, submitted herewith; the Declaration of Julian Hammond; the Declaration of Abbas Kazerounian; the complete file and record in this action; the argument of counsel; and such other and further evidence and argument as the Court may choose to entertain.

Respectfully submitted,

Dated: February 2, 2016

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**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' UNOPPOSED
MOTION FOR ORDER GRANTING
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: March 14, 2016

Time: 10:30 a.m.

Courtroom: 5A

Judge: Hon. Roger T. Benitez

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1 Plaintiffs hereby submit this Memorandum of Points and Authorities in support of
2 their unopposed request for preliminary approval of a class action settlement between
3 Plaintiffs Tracy Davis and Tiffany Lapuebla (“Plaintiffs”) and Defendant Birchbox,
4 Inc.’s (“Birchbox” or the “Defendant”).

5 **I. INTRODUCTION**

6 This consumer class action arises from Plaintiffs’ allegations that Defendant failed
7 to comply with California’s Automatic Renewal Law (Business & Professions Code §
8 17600, *et seq.*) (“ARL”), which imposes detailed information, notice, and consent
9 requirements on businesses that make automatic renewal or continuous service offers to
10 California consumers. Plaintiffs brought this consolidated class action on behalf of
11 themselves and all similarly situated California consumers who purchased subscriptions
12 to Birchbox’s monthly deliveries of make-up and personal care products that
13 automatically renewed from December 1, 2010 through March 6, 2015. In their
14 complaint, Plaintiffs alleged that Birchbox (a) failed to disclose to consumers the
15 automatic renewal offer terms in a “clear and conspicuous manner before the
16 subscription or purchase agreement [was] fulfilled and in visual proximity . . . to the
17 request for consent to the offer”, (b) failed to obtain Plaintiffs’ and Class Members’
18 affirmative consent to the agreement containing the automatic renewal offer terms before
19 charging their credit cards, and (c) failed to provide an acknowledgment that included
20 the automatic renewal offer terms, cancellation policy, and information about how to
21 cancel in a manner that was capable of being retained by the consumer, all in violation of
22 Business & Professions Code § 17602(a)(1-3), the Unfair Competition Law (Business &
23 Professions Code § 17200 *et seq.* (“UCL”), and the False Advertising Law (Business &
24 Professions Code § 17535) (“FAL”).

25 After almost one year of litigation and a full-day mediation session with a highly
26 regarded and experienced mediator Bruce Friedman, the parties have entered into a
27 Settlement Agreement and Release (“Settlement Agreement”, “Settlement” or “SA”),
28 which is now presented to the Court for preliminary approval. The Settlement

1 Agreement is submitted herewith, as Exhibit 2 to the Declaration of Julian Hammond,
2 also submitted herewith (“Hammond Decl.”).

3 For the reasons set forth below, Plaintiffs assert that the settlement is fair and
4 reasonable, and warrants preliminary approval. Defendant does not oppose this motion.
5 Accordingly, Plaintiffs respectfully request that the Court (1) grant preliminary approval
6 of the proposed Settlement, (2) approve the proposed notice procedure and the form,
7 manner, and content of the notice, (3) stay all proceedings until the Court renders a final
8 decision on the approval of the Settlement, (4) conditionally certify the proposed
9 Settlement Class, (5) conditionally appoint Plaintiffs as Class Representatives and
10 Plaintiffs’ Counsel as Class Counsel, and (6) schedule a hearing for final approval.

11 **II. PRE-SETTLEMENT PROCEEDINGS AND STATUS OF THE** 12 **LITIGATION**

13 **A. California’s Automatic Renewal Law**

14 As of December 1, 2010, California Senate Bill 340, codified in the Business and
15 Professional Code at § 17600 *et seq.*, imposed very specific information, notice and
16 consent requirements on businesses that make automatic renewal or continuous service
17 offers to California consumers. This law was passed in response to increasing complaints
18 from consumers about unwanted charges on their credit cards for products and/or
19 services that they did not explicitly request or know they were agreeing to. Hammond
20 Decl. at ¶ 24; Kazerounian Decl. ¶ 31. The ARL’s core requirements are that (1)
21 businesses must clearly and conspicuously disclose automatic renewal terms of any offer,
22 as defined by the statute, (2) they must obtain a consumer’s affirmative consent, and (3)
23 they must provide consumers with an acknowledgment containing the terms of the
24 automatically renewing offer and cancellation information. *Id.* Pursuant to Business and
25 Professional Code § 17603, Plaintiffs assert that, where a business sends products to a
26 consumer under automatic renewal of a purchase without first obtaining the consumer’s
27 affirmative consent, “the goods, wares, merchandise, or products shall for all purposes be
28 deemed an unconditional gift to the consumer.”

1 **B. Factual Background**

2 Birchbox is an internet-based company that sells men’s and women’s subscription
3 plans for the monthly delivery of beauty products, including sample make-up and
4 personal care products through its website, www.birchbox.com. Hammond Decl. at ¶ 12;
5 Kazerounian Decl. ¶ 19. Subscriptions renew automatically, unless a consumer cancels
6 before the auto-renewal date. *Id.* The complaint alleges, and Plaintiffs contend that
7 evidence shows, that Birchbox’s Terms and Conditions do not sufficiently disclose to
8 consumers that subscriptions renew automatically. In particular, Plaintiffs contend that
9 Birchbox’s Terms and Conditions do not indicate that the subscriptions auto-renew; do
10 not inform consumers about how to cancel subscriptions; do not provide length of
11 term(s); and allegedly do not set out any of the information that is provided about
12 automatic renewal from the rest of the text in a clear and conspicuous manner. *See* §
13 17602; (b); Complaint at ¶¶ 27-28 & Ex. 2 (Terms and Conditions). The Complaint also
14 alleges, and Plaintiffs further contend that the evidence shows, that Birchbox’s sign-up
15 process failed to comply with the statutory requirements in a number of ways. *See*
16 Complaint, ¶¶ 29-37 & Exs. 3-10.

17 **C. Procedural Background**

18 Plaintiff Lapuebla filed her action on January 30, 2015 in the Southern District of
19 California, San Diego. *See LaPuebla v. Birchbox*, Case No. 3:15-cv-00214-BEN-BGS
20 (Dkt. 1). Subsequently, Plaintiff Davis filed her action on March 4, 2015 in the
21 Southern District of California, San Diego. Dkt. 1. On April 30, 2015 the Court granted
22 Plaintiffs’ unopposed joint motion to consolidate the *Davis* and *LaPuebla* actions, and
23 appointed HammondLaw and Kazerouni Law Group as interim co-lead counsel. Dkt. 18.
24 On May 14, 2015 Plaintiffs filed their consolidated amended complaint (“Complaint”).
25 Dkt. 21.

26 On May 1, 2015, following the Court’s order granting Plaintiffs’ motion to
27 consolidate, Birchbox filed its motion to transfer venue to the United States District
28 Court for the Southern District of New York pursuant to the forum selection clause

1 contained in Birchbox's Terms and Conditions. Dkt. 19. After fully briefing the motion,
2 the parties stipulated to stay the proceedings in order to attend mediation. Dkt. 23- 24;
3 26.¹

4 Thereafter, the Parties engaged in informal discovery and engaged Bruce
5 Friedman as a neutral mediator. Hammond Decl. ¶¶ 14-15; Kazerounian Decl. ¶¶ 21-22.
6 Although the Parties strongly disagreed on the relative merits and defenses, they
7 analyzed the probability of attaining class certification and considered the overall merits
8 of the claims and defenses. Hammond Decl. ¶ 13; Kazerounian Decl. ¶ 20. Defendant's
9 data, including data regarding the size of the Class and revenue generated by
10 Defendant's auto-renewing subscriptions, was also analyzed. Hammond Decl. ¶ 14;
11 Kazerounian Decl. ¶ 21. Thus, the Parties were sufficiently informed to arrive at a
12 realistic settlement valuation of this action. *Id.*

13 **D. Discovery and Mediation**

14 The parties engaged in informal discovery. Defendant produced information
15 regarding Birchbox's subscription-based revenue from California consumers broken
16 down by subscription type (Men's or Women's). Hammond Decl. at ¶ 14; Kazerounian
17 Decl. ¶ 21. Birchbox also provided the amount of revenue generated by the initial
18 subscription payments and all subsequent payments received from Class Members. *Id.*
19 The parties also participated in numerous telephone calls and e-mail exchanges leading
20 up to the mediation. *Id.*

21 On September 16, 2015 the parties attended a full-day mediation before Mr.
22 Friedman in San Francisco. Hammond Decl. ¶ 15; Kazerounian Decl. ¶ 22. The parties
23 were unable to reach a settlement at that time but agreed to continue their settlement
24 negotiations through Mr. Friedman. Hammond Decl. ¶ 17; Kazerounian Decl. ¶ 24. On
25 October 29, 2015 the Parties met at Defendant's counsel's office in New York City and
26

27
28 ¹ Defendant has not filed its answer to Plaintiffs' Consolidated Amended Complaint
pursuant to the Court's order extending time for Defendant to respond until 30 days
following the Court's ruling on the pending motion to transfer venue. Dkt. 22.

1 tentatively reached an agreement on the consideration for the class. *Id.* This agreement
2 was reached prior to engaging in any discussions regarding attorneys' fees, costs, or
3 incentive awards to Plaintiffs. Hammond Decl. ¶ 20; Kazerounian Decl. ¶ 27. Following
4 two more months of negotiation through Mr. Friedman, the parties reached a settlement
5 in general terms, which was later reduced to writing and are more fully specified in the
6 Settlement Agreement. Hammond Decl. ¶ 21; Kazerounian Decl. ¶ 28.

7 **E. Summary of the Terms of Settlement**

8 The Settlement resolves all of the claims of Plaintiffs and the proposed Class
9 against Defendant. In summary, the Settlement Class Members consists of "all persons
10 who disclosed a California billing address when ordering an Annual or Monthly
11 Rebillable Subscription from Birchbox, including Men's and Women's Rebillable
12 Subscriptions, and that automatically renewed at any time between January 1, 2011 and
13 March 6, 2015." SA § 1.1. The Settlement provides Class Members credits good for the
14 purchase of future products or subscriptions from Birchbox its website. Hammond Decl.
15 ¶ 19; Kazerounian Decl. ¶ 26. Class Members who subscribed to the Women's Rebillable
16 Subscription will each receive a total of \$10 credit, provided in two equal \$5 amounts, to
17 be used separately; and Class Members who subscribed to the Men's Rebillable
18 Subscription will each receive a total of \$20, provided in two equal \$10 amounts, to be
19 used separately. *Id.* These credits represent the value of a one-month subscription for
20 each Class Member. *Id.* Class Members need not submit a claim form in order to receive
21 a credit; each Class Member who does not seek exclusion will receive the applicable
22 credit. *Id.* In addition to the monetary relief, Defendant has agreed to modify its
23 disclosures to clearly and conspicuously describe the automatic renewal offer terms and
24 to require subscribers to affirmatively consent to the offer in compliance with the ARL.
25 Hammond Decl. ¶ 18; Kazerounian Decl. ¶ 25; SA § 2.2. Defendant acknowledges that
26 these modifications are a result of the Complaint. *Id.*

27 The Settlement Agreement also provides for Defendant to bear all costs of notice
28 and administration; to pay Class Counsel an attorney-fee award of up to \$300,000

(subject to this Court's approval) for attorneys' fees and costs; and to pay a service award of up to \$2,500 to each Named Plaintiff. SA §§ 2.6 and 2.4.

F. Summary of Notices and Notice Plan

After reviewing the available contact information for Class Members, the parties agreed on two forms of notice: (a) Email Notice (Exhibit C to the SA) and (2) Long-Form Notice (Exhibit B to the SA). The Email Notice will include a summary of settlement terms, information on how to opt-out or object to the settlement, and a link to the Settlement Website, where more information, including the Long-Form Notice, can be found. SA §§ 1.11 and 3.3(c); Ex. C thereto. The Long-Form Notice will include complete terms and provisions of the settlement; the benefit that settlement provides for the Class Members; attorneys' fees and Class Representative award; and the date, time, and place of the final settlement approval fairness hearing. SA §§ 1.09 and 3.3(c); Ex. B thereto. Both Notices inform the Class Members that they will be bound by the judgment and that they have the right to appear in or be excluded from the Litigation. Both Notices further provide the deadline for submitting objections, and the Long-Form Notice describes the process by which a party may appear or opt out of the Settlement Class.

The Settlement Administrator will, among other things, send the Email Notice and postcard notice as applicable; set up the designated website, which will contain the Long-Form Notice, the Complaint, and the Preliminary Approval Order; and distribute the credits to Class Members who do not exclude themselves. SA §§ 2.1(a), 3.3, 3.6. The Settlement Administrator will also mail a postcard to the most recent mailing address for those e-mails that bounce back, and will immediately conduct a standard skip trace if the postcard is returned without a forwarding address. *Id.* at § 3.3. All objections and requests for exclusion must be completed and post-marked no later than ninety (90) days after Preliminary Approval Order. SA §§ 3.8, 3.9.

G. Releases

The release set out in the proposed Settlement corresponds to the claims made against Defendant in the Complaint filed on May 14, 2015. SA § 4.2. In exchange for

1 receiving an Incentive Awards, Plaintiffs will also give an additional general release
2 against Defendant.

3 **III. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE**

4 **A. The Court Should Preliminarily Approve This Class Action Settlement Under** 5 **Rule 23(e) of the Federal Rules of Civil Procedure.**

6 A certified class action may not be dismissed, compromised or settled without
7 approval of the Court. *See* Fed. R. Civ. P. 23(e). Proper review and approval of a class
8 action settlement requires three steps: (1) preliminary approval of the proposed
9 settlement after submission of a written motion; (2) dissemination of mailed and/or
10 published notice of the settlement to all class members; and (3) a formal fairness hearing,
11 or final settlement approval hearing, at which class members may be heard regarding the
12 settlement, and at which evidence and argument concerning the fairness, adequacy, and
13 reasonableness of the settlement is presented. *Manual for Complex Litigation* (4th ed.
14 2004), § 21.61. The decision to approve or reject a proposed settlement is committed to
15 the sound discretion of the court. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027
16 (9th Cir. 1998).

17 Federal Rule of Civil Procedure 23 requires that all class action settlements satisfy
18 two primary prerequisites before a court may grant certification for purposes of
19 preliminary approval: (1) that the settlement class meets the requirements for class
20 certification if it has not yet been certified (Fed. R. Civ. P. 23(a) and (b); *Hanlon*, 150
21 F.3d at 1020); and (2) that the settlement is fair, reasonable, and adequate (Fed. R. Civ. P.
22 23(e)(2)). Here, both of these requirements for preliminary approval of this class action
23 settlement are satisfied.

24 **B. The Settlement Class Satisfies the Requirements of Federal Rule of Civil** 25 **Procedure, Rule 23 for Conditional Certification.**

26 Rule 23(a) sets out four prerequisites for class certification: (1) numerosity, (2)
27 commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. P. 23(a)(1)-
28 (4). Furthermore, Rule 23(b)(3) provides that a class action seeking monetary relief may

only be maintained if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). All of these requirements are met here.²

1. FRCP 23(a) Requirements for Class Certification Have Been Met.

a. The Class is Ascertainable and Sufficiently Numerous.

Ascertainability is satisfied when it is “administratively feasible for the court to determine whether a particular individual is a member” of the proposed class. *In re Northrop Grumman Corp. ERISA Litig.*, No. cv-06-06213, 2011 WL 3505264 at *7 n. 61 (C.D. Cal. Mar. 29, 2011). The numerosity prerequisite demands that the class be large enough that joinder of all members would be impracticable. Fed. R. Civ. P. 23(a)(1). While there is no exact numerical cut-off, courts have routinely found numerosity satisfied with classes of at least forty (40) members. See, e.g., *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988) (40 class members satisfies numerosity); *Keegan v. American Honda Motor Co.*, 284 F.R.D. 504, 522 (C.D. Cal. 2012)(same). These requirements are met. Defendant maintains records of all California consumers who purchased a subscription to Birchbox during the Class Period. Thus, ascertainability is met. *Corson v. Toyota Motor Sales U.S.A., Inc., et al.*, CV 12-8499-JGB (C.D. Cal. August 3, 2015) (Order granting Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement). According to Birchbox’s records, there are 147,915 putative Class Members. SA § 1.1. This figure meets the numerosity requirement.

b. The Commonality Requirement is Satisfied.

The commonality prerequisite for class certification concerns the existence of questions of law and/or fact common to the class and is “construed permissively.”

² Defendant has stipulated to the certification of the proposed class and appointment of the proposed class representatives and Class Counsel, for purposes of settlement approval only, but has reserved its positions opposing certification in the event the settlement is not approved.

1 *Hanlon*, 150 F.3d at 1019. The common questions here include (1) whether Birchbox
2 failed to disclose the automatic renewal offer terms in a clear and conspicuous manner
3 and in visual proximity to the request for consent to the offer; (2) whether Birchbox
4 failed to obtain consumers' affirmative consent to the automatic renewal offer terms; and
5 (3) whether Birchbox failed to provide an acknowledgement, capable of being retained
6 by the consumer, that contained the automatic renewal offer terms and information on
7 how to cancel. Complaint, ¶ 43.b. Plaintiffs contend that all of the Class Members were
8 led through the same sign-up process and encountered the same failed disclosures to the
9 same extent. Complaint, ¶¶ 29-37. The existence of these policies as uniformly applied to
10 the entire Class and the question of whether those policies violated the ARL and the UCL
11 satisfy the commonality requirement of Rule 23(a)(2).

12 ***c. Plaintiffs' Claims are Typical of Those of the Putative Class.***

13 The typicality prerequisite of Rule 23(a) is met if the named Plaintiffs claims "are
14 reasonably co-extensive with those of absent class member; they need not be
15 substantially identical." *Hanlon*, 150 F.3d at 1020. Here typicality is satisfied because
16 the Plaintiffs' claims are the very same as the claims brought by Class Members – they
17 purchased Birchbox subscriptions through the same sign-up process, were presented with
18 the same disclosures, were exposed to the same allegedly unwanted recurring
19 subscription charges, and seek the same type of relief. Complaint ¶ 43.c.

20 ***d. Plaintiffs and Their Counsel Will Fairly and Adequately Represent***
21 ***the Class.***

22 The adequacy prerequisite permits class certification only if the "representative
23 parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P.
24 23(a)(4). This means that the proposed class representatives and their counsel cannot
25 have conflicts of interest with the class and must vigorously prosecute the action on
26 behalf of the class. *Hanlon*, 150 F.3d at 1020. Neither Plaintiffs nor their counsel have a
27 conflict with any putative class member as their interests are virtually coextensive with
28 the Class' interests. Complaint ¶ 43.d. Similarly, Plaintiffs' Counsel has and will

1 continue to vigorously prosecute the action on behalf of the Plaintiffs and the Class.
 2 Class Counsel has significant experience litigating class actions and have been certified
 3 by numerous state and federal courts as competent and adequate class counsel. Hammond
 4 Decl., ¶¶ 6-9; Kazerounian Decl. ¶¶ 6-13.

5 **2. FRCP 23(b)(3) Requirements for Class Certification Have Been Met.**

6 Under Rule 23(b)(3), plaintiffs must demonstrate that common questions
 7 “predominate over any questions affecting only individual members” and that a class
 8 action is “superior to other available methods for fairly and efficiently adjudicating
 9 controversy.” Predominance tests whether the proposed class is sufficiently cohesive to
 10 warrant adjudication by representation. *Hanlon*, 150 F.3d at 1022. In other words, courts
 11 must determine whether the focus of the proposed class action will be on the actions and
 12 conduct of the defendants rather than the behavior of individual class members. *Hanlon*,
 13 150 F.3d at 1022-23. Here, the common questions of Defendant’s alleged failure to
 14 adhere to the California ARL’s disclosure, consent, and acknowledgment requirements,
 15 and whether that failure violates the law, predominate over any potential individualized
 16 issues.

17 Further, this class action would be a superior method of adjudication compared to
 18 a multitude of individual suits. To determine if the class approach is superior, courts
 19 consider: (1) the interest of class members in individually controlling the prosecution of
 20 separate actions; (2) the extent and nature of any litigation concerning controversy
 21 already commenced by or against members of the class; (3) the desirability of
 22 concentrating the litigation in the particular forum; and (4) the difficulties likely to be
 23 encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D).
 24 “Where parties seek class certification for settlement purposes only, courts need not
 25 consider the final two factors which address trial manageability.” *Corson v. Toyota*
 26 *Motor Sales U.S.A., Inc., et al.*, CV 12-8499-JGB (C.D. Cal. August 3, 2015) (citing
 27 *Franco v. Ruiz Food Products, Inc.*, 2012 WL 5941801 at*9 (E.D. Cal. Nov. 27, 2012)).
 28 Here, a class action device is preferable because the Class Members do not have a strong

1 interest in controlling their individual claims, as the individual prosecution of the claims
 2 would be identical to and duplicative of the class action litigation. The use of the class
 3 action mechanism here would also efficiently resolve numerous identical claims at the
 4 same time while avoiding the waste of judicial resources and eliminating the possibility
 5 of conflicting decisions from repetitious litigation. Because there are no manageability
 6 issues presented by the resolution of the Class' identical ARL and UCL claims, a class
 7 action is the superior method for adjudication the claims in this action.

8 **IV. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**

9 In deciding whether to approve a proposed class action settlement, the Court must
 10 find that the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P.
 11 23(e)(2); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).
 12 Included in this analysis are considerations of "(1) the strength of the plaintiffs' case; (2)
 13 the risk, expense, complexity, and likely duration of further litigation; (3) the risk of
 14 maintaining class action status throughout the trial; (4) the amount offered in settlement;
 15 (5) the extent of discovery completed and the stage of the proceedings; (6) the experience
 16 and views of counsel; (7) the presence of a governmental participant; and (8) the reaction
 17 of the class members to the proposed settlement." *Rodriguez v. W. Publ'g Corp.*, 563
 18 F.3d 948, 963 (9th Cir. 2009).

19 Importantly, there is a presumption of fairness "if the settlement is recommended by
 20 class counsel after arm's-length bargaining." *Wren v. RGIS Inventory Specialists*, No. C–
 21 06–05778 JCS, 2011 WL 1230826, at *6 (N.D. Cal. April 1, 2011); *Nat'l Rural*
 22 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("Great
 23 weight is accorded to the recommendation of counsel . . . because parties represented by
 24 competent counsel are better positioned than courts to produce a settlement that fairly
 25 reflects each party's expected outcome in the litigation"). There is also "a strong judicial
 26 policy that favors settlements, particularly where complex class action litigation is
 27 concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). Applying
 28 these factors to this case, it is clear that the proposed settlement is fair, reasonable, and

adequate.

A. The Settlement Was a Product of Informed, Non-Collusive Negotiations

Courts routinely presume a settlement is fair where it is reached through arm's-length bargaining as it was here. *See Hanlon*, 150 F.3d at 1027 (affirming trial court's approval of class action settlement where parties reached agreement after several months of negotiation and the record contained no evidence of collusion). The ongoing assistance of a skilled class-action mediator confirms that the settlement was non-collusive. *Satchell v. Fed. Exp. Corp.*, No. C 03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr.13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."); *Carter v. Anderson Mech., LP*, No. EDCV 07-0025-VAP, 2010 WL 1946784, at *7 (C.D. Cal. May 11, 2010) (citing *Satchell*). Furthermore, where counsel are well-qualified to represent the proposed class in a settlement based on their extensive class action experience and familiarity with the strengths and weakness of the action, courts find this factor to support a finding of fairness. *Wren*, 2011 WL 1230826, at *10; *Carter*, 2010 WL 1946784, at *8 ("Counsel's opinion is accorded considerable weight.").

As detailed more fully in the declarations of Class Counsel, the settlement is the result of settlement negotiations between the parties conducted at arm's length and informed by substantial investigation. Hammond Decl. ¶¶ 10-17; Kazerounian Decl. ¶¶ 17-24. The mediation session was conducted by a skilled, experienced mediator, Bruce Friedman. Hammond Decl. ¶ 14; Kazerounian Decl. ¶ 21. Class Counsel has extensive background in complex litigation and has experience litigating and settling similar ARL class actions. Hammond Decl., ¶¶ 7-9; Kazerounian Decl. ¶¶ 6-13. These factors support a finding that the Settlement is fair, reasonable, and adequate.

B. The Strength of Plaintiffs' Case Balanced Against the Settlement Amount

The proposed Settlement results in a substantial benefit valued at \$1,572,240 on behalf of over 147,000 class members that does not require Class Members to submit any claims. Hammond Decl. ¶ 19; Kazerounian Decl. ¶ 25. Each Class Member who

1 does not opt out will receive either \$10 or \$20 of Birchbox credit that can be used to
2 purchase any Birchbox goods or subscriptions for up to one year following issuance. *Id.*
3 The Class will also receive significant benefit from modifications to Defendant's
4 enrollment process and website terms and conditions which Birchbox made in response
5 to the filing of this Action. *Id.*; SA at § 2.2.

6 This Settlement is a fair compromise given the litigation risks and uncertainties
7 presented by continued litigation. While Plaintiffs are confident in their position and
8 believe their claims are strong, the monetary value of their claims is low, and the risks of
9 litigation are high. Plaintiffs' Counsel is also experienced and realistic enough to know
10 that the recovery and certainty achieved through settlement, as opposed to the
11 uncertainty inherent in class certification and the trial and appellate process, weighs
12 heavily in favor of settlement. This is especially true where there is no precedent on
13 point as here, given that the ARL is a recently enacted and untried law and no plaintiff
14 has yet obtained either class certification or a class-wide remedy by court order in a fully
15 litigated (i.e., not settled) action brought under the ARL, to counsel's knowledge.
16 Hammond Decl. ¶¶ 23-26; Kazerounian Decl. ¶¶ 30-33.

17 Plaintiffs have to overcome a number of hurdles before be able to try this matter to
18 a conclusion. Birchbox vigorously contests liability, the amount of damages, and the
19 propriety of class certification. Although Plaintiffs dispute Birchbox's positions, they
20 understand and considered the risks. First, Plaintiffs took into consideration Defendant's
21 pending motion to transfer venue pursuant to its New York forum selection clause.
22 Furthermore, Defendant has indicated that, if granted, it would then argue that New York
23 law applies pursuant to the governing law provision. Although Plaintiffs dispute
24 Defendant's positions, if Defendant was successful in arguing that New York law
25 applies, this would jeopardize Plaintiffs' claim under ARL or the UCL. Hammond Decl.
26 ¶¶ 12 and 29; Kazerounian Decl. ¶¶ 19 and 36. Even if Defendant's motions were
27 denied, Plaintiffs would have to prevail on (1) class certification, and (2) on the merits.
28 Hammond Decl. ¶¶ 13 and 31; Kazerounian Decl. ¶¶ 20 and 38. For example, Plaintiffs

1 faced the risk that the Court might conclude that the disclosures Birchbox provided fully
2 complied with the ARL, or that Birchbox complied in good faith and therefore could not
3 be held liable under Bus. & Prof. Code § 17604 (describing good faith compliance
4 doctrine). Hammond Decl. ¶ 13.

5 Even assuming Plaintiffs obtained a judgment against Defendant at trial, the
6 damages that would be awarded are uncertain, as compared to settling now and
7 providing each Class Member with credits equal to the amount of a one-month Birchbox
8 subscription. Hammond Decl. at ¶ 13; 26; 31; Kazerounian Decl. ¶¶ 20, 31, 38.

9 Pursuant to Bus. & Prof. Code § 17603, anytime a business sends goods under
10 “automatic renewal of purchase,” the goods are deemed a gift. Thus, there is a risk that
11 the Court would determine that Plaintiffs could not recover for the initial subscription
12 month because only the subscription for the subsequent months could be considered
13 automatic *renewal* of purchase. *Id.* Defendant has also asserted that Plaintiffs cannot not
14 properly seek recovery because they never alleged that they were not aware that
15 Birchbox’s subscription renewed automatically. Moreover, given that Class Members
16 had Birchbox’s goods delivered monthly to their doorsteps, even those Class Members
17 who were unaware of the automatic renewal immediately upon signing up would have
18 learned of it upon receiving the deliveries. Although Plaintiffs dispute the arguments,
19 should the Court adopt such arguments, damages could be limited to a refund of one
20 month subscription. Thus, while Plaintiffs contend that a jury could require Defendant
21 to refund the value of subscription for all automatically renewing months during the
22 Class Period (i.e., the first or second month through the last month of subscription), such
23 a result is not guaranteed. Hammond Decl. ¶ 26; Kazerounian Decl. ¶ 33.

24 Each of these hurdles poses substantial risks to Plaintiffs’ ability to win the case
25 and make a recovery on behalf of the class, for reasons described in detail in the
26 Hammond Declaration, ¶¶ 12-13 and 26-31; Kazerounian Decl. ¶¶ 19-20 and 33-38.
27 While Plaintiffs believe they could prevail on the merits, they also recognizes the risk
28 that Defendant might prevail instead—in which case the class could recover nothing.

In sum, the settlement, negotiated at arms' length, is fair and reasonable in light of the strengths and weaknesses of Plaintiffs' case. The settlement value is greatly enhanced and further shown to be adequate by the fact that Defendant has agreed to change the disclosures regarding the automatic renewal offer to make them clear and conspicuous and to require that consumers affirmatively consent to the automatic renewal offer. Hammond Decl. ¶ 18; Kazerounian Decl. ¶ 25; SA at § 2.2.

C. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

Further litigation of this case poses real risks for a number of reasons, and would result in significant additional costs and delay. First, the Court would rule on Defendant's pending motion to transfer to venue to New York. Hammond Decl. at ¶ 30; Kazerounian Decl. ¶ 37. Defendant has indicated that, if successful on that motion, it would argue that New York law applies, thus jeopardizing Plaintiffs' ARL and UCL claims. *Id.* If the motions were denied, Plaintiffs would file a motion for class certification. Hammond Decl. ¶ 31; Kazerounian Decl. ¶ 38. A hearing would be scheduled and time would have to be allowed to complete the extensive briefing and discovery issues. *Id.* Then, there would still be a risk of non-certification. *Id.* Further, time would have to be allowed for merits discovery, dispositive motions, trial preparation, and trial. *Id.* There would be a risk of unfavorable rulings on the merits and the cost of such litigation would be substantial. *Id.* Furthermore, it would delay the final outcome by several years and put Class Members at risk of recovering nothing at all. *Id.* In contrast, this settlement will conserve the resources of the parties and the Court, and provides Class Members with a meaningful recovery on their claims. Hammond Decl. ¶ 33; Kazerounian Decl. ¶ 40. See *Nat'l Rural*, 221 F.R.D. at 526 ("[U]nless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.").

D. The Extent of Discovery Completed And The Stage of The Proceedings

As discussed above, and as further described in the declarations of Class Counsel (Hammond Declaration ¶¶ 10-11 and 14; Kazerounian Decl. ¶¶ 18-19 and 21), Plaintiffs

1 and Defendant engaged in significant investigation and evaluation of the factual and legal
2 strengths and weaknesses of their respective cases. Birchbox produced, and Plaintiffs’
3 counsel carefully analyzed, information regarding its subscription-based revenue.
4 Hammond Decl. ¶ 14; Kazerounian Decl. ¶ 21. Despite the litigation being at a relatively
5 early stage, Plaintiffs have engaged in investigation and discovery that is sufficient to
6 inform them decision to settle this case. *Id.* Accordingly, the Parties certainly have a clear
7 view of the strengths and weaknesses of their case – “sufficient information to make an
8 informed decision about settlement.” Newberg on Class Actions § 13.50 (5th ed. 2014)
9 (quoting *Barani v. Wells Fargo*, No. 12CV2999-GPC (KSC), 2014 WL 1389329, at *5
10 (S.D. Cal. Apr. 9, 2014); *See Lewis v. Starbucks Corp.*, No. 2:07-cv- 00490-MCE, 2008
11 WL 4196690, at *6 (E.D. Cal. Sept. 11, 2008) (“[A]pproval of a class action settlement is
12 proper as long as discovery allowed the parties to form a clear view of the strengths and
13 weaknesses of their cases.”).

14 **E. Views of Experienced Counsel Support the Reasonableness of the Settlement**

15 Class Counsel has represented Plaintiffs in numerous class-action lawsuits in
16 California, has extensive experience in class action litigation, and has been determined by
17 numerous courts to be adequate class counsel. Hammond Decl. at ¶¶ 7-9; Kazerounian
18 Decl. ¶¶ 6-13.

19 Class Counsel considers the settlement to be fair, reasonable, and adequate. As
20 stated above, the monetary benefit the settlement provides to Class Members is
21 meaningful and fair, especially considering (1) that if the case went to trial and Plaintiffs
22 won, Plaintiffs’ damages are uncertain; and (2) the additional risks facing Plaintiffs in
23 further litigation including Defendant’s pending motion to transfer venue, and the risks of
24 non-certification and losing on the merits in trial. Hammond Decl. ¶¶ 26; 30-31;
25 Kazerounian Decl. ¶¶ 33, 37-38. Based on Class Counsel’s experience, Class Counsel
26 believes that the instant case settled on excellent terms. Hammond Decl. ¶ 33,
27 Kazerounian Decl. ¶ 40.

28 //

F. Reaction of The Class Members to The Proposed Settlement

It is premature to address this factor since notice has not yet been sent out. The settlement, however, confers meaningful changes to Birchbox's business overall practices and significant monetary benefits to the Class Members. This promises a very favorable response.

1. The Proposed Class Notice Content and Procedure Are Adequate

Rule 23(e) requires notice that describes "the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Lane*, 696 F.3d at 826. In order to protect the rights of absent class members, courts must provide the best notice practicable of a potential class action settlement. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974). Rule 23(e) does not guarantee any particular procedure but rather requires only notice reasonably calculated "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

In the instant case, the proposed Long-Form Notice and Email Notice (collectively "Notices") meet these standards since they provide, in simple, plain language, all the information a reasonable person would need to make a fully informed decision about the settlement including: (a) the benefit that settlement provides for the Class Members, (b) the amount class counsel will seek in fees, litigation expenses, and incentive awards, (c) the process by which a party may appear or opt out of the Settlement Class, (d) the deadline for objecting and (e) the date, time, and place of the final settlement approval fairness hearing. See *In Re Online DVD Rental Antitrust Litigation*, 779 F.3d 934, 947 (2015). SA at § 1.9; Ex. B. Both Notices inform the Class that they will be bound by the judgment unless they exclude themselves from the litigation. Exhibits B and C to the SA. Therefore, the Court should approve the Notice content.

1 The procedure for distributing notice meets the requirement that it have “a
2 reasonable chance of reaching a substantial percentage of the class members.” *Cartt v.*
3 *Superior Court*, 50 Cal.App.3d 960, 974 (1975). Here, the Settlement Administrator will
4 operate a designated website which will contain, among other things, the Long-Form
5 Notice. SA § 3.3(a). Email Notice providing the web address of the internet posting will
6 be sent electronically to the e-mail addresses in Birchbox’s records used by Class
7 Members to register for Birchbox’s subscription. SA § 3.3(a). For those e-mails that
8 bounce back, the Settlement Administrator will mail a postcard to the most recent
9 mailing address for the Class Members that is contained in Birchbox’s records. SA §
10 3.3(a). An e-mail notice will be sent a second time twenty days after the first Email
11 Notice is sent. SA § 3.3(a). As such, the Notice is likely to reach most, if not all, Class
12 Members. Therefore, the Court should approve the process for distributing Notice.

13 **2. Class Representatives’ Incentive Award is Well-Justified and Reasonable**

14 The proposed incentive awards to each Named Plaintiff of \$2,500 allocated by the
15 Settlement is reasonable and should be approved because class representatives in class
16 action litigation are eligible for reasonable participation payments to compensate them
17 for the risks assumed and efforts made on behalf of the Class. *See Staton v. Boeing Co.*,
18 327 F.3d 938, 976 (9th Cir. 2003). “Courts routinely approve incentive awards to
19 compensate named plaintiffs for the services they provided and the risks they incurred
20 during the course of the class action litigation,” sometimes in amounts many times
21 greater than requested here. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300
22 (N.D. Cal. 1995) (named plaintiff received \$50,000 for work in class action); *In Re*
23 *Online DVD Rental Antitrust Litigation*, 779 F.3d 947-948 (upholding incentive awards
24 of \$5,000 for each of nine class representatives). The factors courts use in determining
25 the amount of service awards include (1) time and effort put into the litigation (*see Van*
26 *Vranken*, 901 F. Supp. at 299; *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998));
27 (2) whether the litigation will further the public policy underlying the statutory scheme at
28 the core of the litigation (*see Roberts v. Texaco, Inc.*, 979 F. Supp. 1815 at 201, n. 25

1 (S.D.N.Y. 1997); (3) risks assumed by Plaintiffs (*Id.* at 202, *Cook*, 142 F.3d at 1016); and
2 (4) the proportion of the payments relative to the settlement amount (*see Staton v.*
3 *Boeing, Co.*, 327 F.3d 938, 977 (9th Cir.2003). All of the above factors support the
4 service award requested here.

5 First, the modest incentive awards of \$2,500 to each Named Plaintiff are
6 appropriate to compensate them for the substantial time and effort they have expended in
7 this litigation. In agreeing to serve as Class Representatives, they formally accepted the
8 responsibilities of representing the interests of all Class Members. Hammond Decl. at ¶
9 34; Kazerounian Decl. ¶ 41. Plaintiffs assisted in preparing and evaluating the case for
10 filing and for mediation, assisted class counsel in reviewing information, and provided
11 Class Counsel with guidance to evaluate and approve the proposed settlement on behalf
12 of the Settlement Class. *Id.* Finally, Defendant does not oppose the request for an
13 incentive award of \$2,500 to each Plaintiff. SA § 2.4.

14 Second, the participation and assistance provided by the Class Representatives was
15 critical to the success of this litigation and the enforcement of the ARL. Without the
16 named Plaintiffs' commitment to come forward and serve as Class Representatives, this
17 litigation, which challenges businesses' alleged misleading and/or deceptive practices
18 related to the failure to disclose the terms of their automatically renewing subscriptions,
19 would not be possible. *Id.*

20 Third, the Class Representatives assumed several risks by agreeing to formally
21 represent the Class. For one, they agreed to assume the potential obligation to pay
22 Defendant's costs, a potentially large amount, if they did not prevail at trial. The other
23 Class Members in this case did not assume this risk. *Id.*

24 Fourth, the \$2,500 enhancement awards represent approximately 0.15% of the
25 \$1,572,240 settlement value. The amount requested for the enhancement award is modest
26
27
28

1 in comparison to such awards approved by other courts. Accordingly, the \$2,500
2 enhancement award to each named Plaintiff should be preliminarily approved.³

3 **3. Class Counsel's Application for Attorneys' Fees and Costs**

4 The proposed Settlement contemplates that Class Counsel shall be entitled to apply
5 to the Court for an award of attorneys' fees, costs, and litigation expenses to be paid by
6 Birchbox separate and apart from the credits paid to Class Members. Attorneys' fees and
7 costs were not discussed until all the material terms of the settlement were agreed upon
8 and will be paid by Birchbox, separate and apart from any consideration being paid
9 directly to the Class. Hammond Decl. at ¶ 34. Defendant has agreed not to oppose such
10 application by Class Counsel so long as the amounts requested are not more than
11 \$300,000. SA § 2.3(a). Such attorneys' fees and costs shall be paid within five (5)
12 business days after the Final Settlement Date and subject to the terms of the Settlement
13 Agreement. *Id.* at 2.3(b)

14 **V. THE FINAL APPROVAL HEARING SHOULD BE SCHEDULED**

15 The last step in the settlement approval process is the formal Final Approval
16 Hearing. This hearing allows the Court to hear all evidence and the arguments necessary
17 to determine whether the settlement is fair, adequate, and reasonable. Plaintiffs request
18 that the hearing be held no earlier than July 18, 2016 to allow sufficient time for any
19 Class Members to opt-out or object to the Settlement.

20 **VI. CONCLUSION**

21 Based on the foregoing, Plaintiffs respectfully request that the Court preliminarily
22 approve the parties' proposed Settlement, and enter an order requiring notice procedures
23 and setting a final approval hearing consistent with Plaintiffs' proposed schedule, as
24 provided for in the Proposed Order submitted with Plaintiffs' Motion.

27
28 ³ Plaintiffs will more thoroughly brief the reasonableness of the requested service awards
in a later fees and costs application to be heard along with their motion for final approval.

1 DATED: February 2, 2016

Respectfully submitted,

2 **HAMMONDLAW, PC**

3
4 By: s/ Julian Hammond

5 JULIAN HAMMOND, CA Bar No. 268489

6 *Attorneys for Plaintiff, Tracy Davis*

7 DATED: February 2, 2016

Respectfully submitted,

8 **KAZEROUNI LAW GROUP, APC**

9
10 By: s/ Abbas Kazerounian

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**TRACY DAVIS, INDIVIDUALLY
AND ON BEHALF OF ALL
OTHERS SIMILARLY
SITUATED,**

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

Lead Case No.:

3:15-CV-00498-BEN-BGS

Case Consolidated with:

3:15-CV-00214-BEN-BGS

**THIS DOCUMENT RELATES TO:
ALL CASES**

**TIFFANY LAPUEBLA,
INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS
SIMILARLY SITUATED,**

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

**DECLARATION OF ABBAS
KAZEROUNIAN IN SUPPORT OF
PLAINTIFFS' UNOPPOSED
MOTION FOR ORDER GRANTING
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: March 14, 2016

Time: 10:30 a.m.

Courtroom: 5A

Judge: Hon. Roger T. Benitez

//

I, ABBAS KAZEROUANIAN, declare as follows:

1. I am an attorney admitted to the State Bar of California in 2007 and have been a member in good standing since that time. I have litigated cases in both state and federal courts in California, Washington, Nevada, Arizona, Arkansas, New York, New Jersey, Colorado, Georgia, Tennessee, North Carolina, Ohio, Illinois and Texas.
2. I am admitted in every federal district in California and have handled federal litigation in the federal districts of California. I am also admitted to the state bar of Texas, Illinois, Washington, the District of Columbia, Michigan, the Ninth Circuit Court of Appeals, and the Supreme Court of the United States. I am a founding partner of Kazerouni Law Group, APC (“KLG”), and co-lead counsel for the named Plaintiffs Tracy Davis and Tiffany Lapuebla (“Plaintiffs” or “Class Representatives”) and the proposed Class (“Class” or “Class Members”) in the above-captioned action (“Action”) against Defendant Birchbox, Inc. (“Defendant” or “Birchbox”) for violations of California’s Automatic Renewal Law (“ARL”), Cal. Bus. & Prof. Code §§ 17600 et seq.
3. I submit this Declaration in support of Plaintiffs’ Unopposed Motion for Order Granting Preliminary Approval of Class Action Settlement seeking the Court’s approval of the Settlement Agreement and Release (“Settlement Agreement”) executed by the parties in resolution of this Action. The statements made herein are made of my own personal knowledge and, if called upon, I could and would testify competently thereto.
4. I serve as interim co-lead counsel for Plaintiffs in this Action together with Julian Hammond of HammondLaw. Hyde & Swigart (H&S) and Berman DeValerio are co-counsel for Plaintiffs. KLG, H&S, HammondLaw and Berman DeValerio are collectively referred to herein as “Plaintiffs’

1 Counsel.” Together, these firms have worked closely to counsel Plaintiffs as
2 to the overall litigation of this Action, as well as strategy, case evaluation,
3 and class certification.

4 5. I have no knowledge of the existence of any conflict of interest between me,
5 my firm, Plaintiffs’ Counsel, and Plaintiffs, on the one hand, and any Class
6 Member, on the other hand.

7 6. I have substantial experience prosecuting complex consumer class action
8 litigation on behalf of a wide variety of plaintiffs. As one of the main
9 plaintiff litigators of consumer rights cases in the Southern District of
10 California, I have been requested to and have made regular presentations to
11 community organizations regarding debt collection laws and consumer
12 rights. These organizations include Whittier Law School, Iranian American
13 Bar Association, Trinity School of Law and Chapman Law School,
14 University of Southern California, Irvine, and California Western School of
15 Law. I was the principle anchor on Time Television Broadcasting every
16 Thursday night as an expert on consumer law between 2012 and 2013. I am
17 a member of the following organizations:

- 18 a. Member of Consumer Attorneys Association of Los Angeles;
- 19 b. Member of the Orange County Bar Association;
- 20 c. Two time Former President of the Orange County Chapter of the
21 Iranian American Bar Association;
- 22 d. Member of National Association of Consumer Advocates;
- 23 e. Member of Consumer Attorneys of California;
- 24 f. Member of the Federal Bar Association; and
- 25 g. Member of the Leading Forum of the American Association of
26 Justice.

- 1 7. I am an adjunct professor at California Western School of Law where I
- 2 teach a three-credit course in consumer law.
- 3 8. I have extensive experience prosecuting cases related to consumer issues.
- 4 My firm, Kazerouni Law Group, APC, in which I am a principal, has
- 5 litigated over 1000 individual based consumer cases and litigated over 400
- 6 consumer class actions. These class actions were litigated in federal courts
- 7 in California, Colorado, Arkansas, Washington, Ohio, Nevada, Arizona,
- 8 Tennessee, Illinois and Texas, as well as California State Courts.
- 9 Approximately 95% percent of my practice concerns consumer litigation.
- 10 9. I have been named Rising Star by San Diego Daily Tribune in 2012, and
- 11 Rising Star in Super Lawyers Magazine in 2013, 2014, 2015, and Super
- 12 Lawyer in 2016.
- 13 10. A significant focus of Kazerouni Law Group, APC's practice concerns
- 14 consumer rights litigation in general, on an individual and class basis,
- 15 including several putative class actions concerning violations of
- 16 California's Automatic Renewal Law (ARL).
- 17 11. I have filed and litigated numerous consumer rights class actions based on
- 18 federal and state consumer statutes in the past several years. The following
- 19 is a non-exhaustive list of consumer rights class actions which I am or have
- 20 been personally involved in:
- 21 a. *Hoffman v. Bank of America Corporation*, 12-CV-00539-JAH-DHB
- 22 (S.D. Cal.) [Dkt. No. 67] (California class action settlement under Penal
- 23 Code 632 et seq., for claims of invasion of privacy. Settlement resulted
- 24 in a common fund in the amount of \$2,600,000; finally approved on
- 25 November 6, 2014);
- 26 b. *Malta, et al. v. Wells Fargo Home Mortgage, et al.*, 10-CV-1290 IEG
- 27 (BLM) (Served as co-lead counsel for a settlement class of borrowers in
- 28

1 connection with residential or automotive loans and violations of the
 2 TCPA in attempts to collect on those accounts; obtained a common
 3 settlement fund in the amount of \$17,100,000; final approval granted in
 4 2013);

5 c. *Conner v. JPMorgan Chase Bank, et al.*, 10-CV-1284 DMS (BGS) (S.D.
 6 Cal.) (Currently serving as co-lead counsel for the settlement class of
 7 borrowers in connection with residential loans and TCPA violations
 8 stemming from the collection of those accounts; Settlement of more than
 9 \$11,000,000; finally approved);

10 d. *In Re: Midland Credit Management, Inc., Telephone Consumer*
 11 *Protection Act Litigation*, 11-md-2286-MMA (MDD) (S.D. Cal.)
 12 (Counsel for a Plaintiff in the lead action, prior to the action being
 13 recategorized through the multi-district litigation process; actively
 14 involved in the MDL litigation and settlement process; Preliminarily
 15 approved for \$18,000,000);

16 e. *In Re: Portfolio Recovery Associates, LLC Telephone Consumer*
 17 *Protection Act Litigation*, 11-md-02295-JAH (BGS) (Counsel for a
 18 Plaintiff in the lead action, prior to the action being recategorized through
 19 the multi-district litigation process; still actively involved in the MDL
 20 litigation and settlement process);

21 f. *Arthur v. SLM Corporation*, 10-CV-00198 JLR (W.D. Wash.)
 22 (Nationwide TCPA settlement achieving \$24.15M; final approval granted
 23 in 2012);

24 g. *Lo v. Oxnard European Motors, LLC, et al.*, 11-CV-1009-JLS-MDD
 25 (S.D. Cal.) (achieving one of the highest class member payouts in a
 26 TCPA action of \$1,331.25; final approval granted in 2012);

- 1 h. *Sarabri v. Weltman, Weinberg & Reis Co., L.P.A.*, 10-01777-AJB-NLS
2 (S.D. Cal.) (approved as co-lead counsel and worked to obtain a national
3 TCPA class settlement where claiming class members each received
4 payment in the amount of \$70.00; final approval granted in 2013);
- 5 i. *Barani v. Wells Fargo Bank, N.A.*, 12-CV-02999-GPC-KSC (S.D. Cal.)
6 (Class action settlement under the TCPA for the sending of unauthorized
7 text messages to non-account holders in connection to wire transfers;
8 finally approved for over \$1,000,000);
- 9 j. *Sherman v. Yahoo!, Inc.*, 2014 U.S. Dist. LEXIS 13286; 13-CV-0041-
10 GPC-WVG (S.D. Cal.) (TCPA class action where Defendant's motion
11 for summary judgment was denied holding that a single call or text
12 message with the use of an ATDS may be actionable under the TCPA).
- 13 k. *Olney v. Progressive Casualty Insurance Company*, 2014 U.S. Dist.
14 LEXIS 9146 (S.D. Cal.); 13-CV-2058-GPC-NLS (Defendant's motion to
15 dismiss or in the alternative to strike the class allegations was denied
16 finding that debt collection calls were not exempt from coverage under
17 the TCPA, case pending);
- 18 l. *Iniguez v. The CBE Group, Inc.*, 2013 U.S. Dist. LEXIS 127066 (E.D.
19 Cal.); 13-CV-00843-JAM-AC (the court denying Defendant's motion to
20 dismiss and to strike class allegations holding that the TCPA applies to
21 any call made to a cellular telephone with an ATDS);
- 22 m. *Wilkins v. HSBC Bank Nevada, N.A.*, Case No. 12-CV-04010-SI (N.D.
23 Ill.) (Finally approved for \$39,975,000 on February 27, 2015);
- 24 n. *Martin v. Wells Fargo Bank, N.A.*, 12-CV-06030-SI (N.D. Cal.);
- 25 o. *Heinrichs v. Wells Fargo Bank, N.A.*, 13-CV-05434-WHA (N.D. Cal.);
- 26 p. *Newman v. ER Solutions, Inc.*, 11-CV-0592H (BGS);
- 27
- 28

- 1 q. *In Re Jiffy Lube International, Inc.*, MDL No. 2261 (finally approved for
- 2 \$47,000,000.00);
- 3 r. *Jaber v. NASCAR*, 11-CV-1783 DMS (WVG) (S.D. Cal.);
- 4 s. *Ridley v. Union Bank, N.A.*, 11-CV-1773 DMS (NLS) (S.D. Cal.);
- 5 t. *Ryabyshchuk v. Citibank (South Dakota) N.A., et al*, 11-CV-1236-IEG
- 6 (WVG);
- 7 u. *Rivera v. Nuvel Credit Company LLC*, 13-CV-00164-TJH-OP (E.D.
- 8 Cal);
- 9 v. *Couser v. Comenity Bank*, No. (S.D. Cal.) (Finally approved TCPA class
- 10 action with common fund of \$8,475,000);
- 11 w. *Fox v. Asset Acceptance, LLC*, No. 14-cv-00734 -GW-FFM (C.D. Cal.)
- 12 (TCPA class action, preliminary approval for \$1,000,000);
- 13 x. *Olney v. Job.com, Inc. et al.*, No. 12-cv-01724-LJO-SKO (E.D. Cal.);
- 14 y. *Stemple v. QC Holdings, Inc.*, 12-cv-01997-BAS-WVG (S.D. Cal.) (class
- 15 certification granted on September 5, 2014 and awaiting preliminary
- 16 approval);
- 17 z. *Newman v. AmeriCredit*, 11-cv-03041-DMS-BLM (preliminarily
- 18 approved for \$8,500,000 on November 26, 2014);
- 19 aa. *Lemieux v. EZ Lube, Inc. et al.*, 12-cv-01791-BAS-JLB (S.D. Cal.)
- 20 (finally approved for \$479,364 on December 8, 2014);
- 21 bb. *Knutson v. Schwan's Home Service, Inc. et al.*, 12-cv-00964-GPC-DHB
- 22 (S.D. Cal.) (Finally approved for \$ 2,535,280);
- 23 cc. *Franklin v. Wells Fargo Bank, N.A.*, Case No. 3:14-cv-02349-MMA-
- 24 BGS (S.D. Cal.)(preliminarily approved for over \$13,000,000);
- 25 dd. *Knell v. FIA Card Services*, Case No. 3:12-cv-00426-AJB-WVG (S.D.
- 26 Cal.) (finally approved for \$2,750,000.00 on August 15, 2014); and
- 27
- 28

1 ee. *Couser v. Apria Healthcare, Inc.*, 8:13-CV-00035-JVS-RNBx, (C.D.
2 Cal.) (finally approved for \$750,000.00 on March 9, 2015).

3 12. In addition to the present action, I am currently putative class counsel in
4 numerous pending consumer class actions involving, *inter alia*, violations
5 of Cal. Bus. & Prof. Code § 17200 (UCL) and § 17600 (California's
6 Automatic Renewal Law or "ARL"), including:

7 a. *Oxina v. Lands' End, Inc.*, Case No. 3L14-cv-02577-MMA-NLS, (S.D.
8 Cal.) (co-counsel with Hyde & Swigart in Cal. Bus & Prof. Code
9 § 17500 (FAL) and § 17533.7 (California False "Made in USA" Claim)
10 putative class action on behalf of consumers who purchased apparel
11 from Lands' End);

12 b. *Cabrera v. Fifth Generation, Inc.*, Case No. 3:14-cv-02990-L-RBB
13 (S.D. Cal.) (co-counsel with Hyde & Swigart in Cal. Bus & Prof. Code
14 §§ 17500 (FAL) and 17200 (UCL) putative class action on behalf of
15 consumers who purchased Tito's vodka);

16 c. *Trax v. Lifelock, Inc.*, Case No. 3:15-cv-00220-MMA-WVG, (S.D. Cal.)
17 (co-counsel with Hyde & Swigart in ARL and UCL putative class action
18 on behalf of subscribers of Lifelock);

19 13. I have successfully argued before the Ninth Circuit Court of Appeals in
20 *Knutson v. Sirius XM Radio*, No. 12-56120 (9th Cir. 2014), which resulted
21 in an order reversing the district court's decision to compel arbitration.

22 14. An article I wrote entitled, *Principles of Litigating Consumer Class Actions*,
23 was published in the February 2015 Edition of the Advocate.

24 15. Throughout this litigation, I have strived to fairly, responsibly, vigorously
25 and adequately represent the putative class members in this action. I believe
26 that I have been successful in that endeavor thus far and shall continue in
27 this vein.

1 16. I will commit the necessary resources and time to represent the interests of
2 the proposed class. Kazerouni Law Group, APC will commit multiple
3 lawyers and support staff, as necessary, to the case. Kazerouni Law Group,
4 APC also has the financial resources to represent the class.

5 17. Prior to filing this consolidated Action, Plaintiffs' Counsel investigated and
6 researched the facts and circumstances underlying the pertinent issues and
7 applicable law. This investigation and research included discussions and
8 interviews between Plaintiffs' Counsel and Plaintiffs and other California
9 consumers who purchased Birchbox subscriptions. Plaintiffs' Counsel also
10 thoroughly investigated Birchbox's disclosures presented during the
11 enrollment process and contained in the Terms and Conditions, as well as
12 information sent to members subsequent to purchase of a Birchbox
13 subscription. That investigation included a thorough review of the
14 screenshots of the registration process and sign-up flow as it appeared at the
15 time of Plaintiff's purchase (and since), copies of various emails sent to
16 Plaintiffs confirming their purchase, and Birchbox's Terms and Conditions
17 in effect at the time of Plaintiffs' purchase (and since). Plaintiffs' Counsel
18 also conducted legal research into the applicable law. As a result of this in-
19 depth investigation, Plaintiffs' Counsel arrived at the conclusion that
20 Plaintiffs' ARL allegations are based upon identical conduct and well suited
21 for class-wide adjudication, as Class Members experienced the same
22 enrollment path and present identical harm to each Class Member as a
23 result of Birchbox's statutory noncompliance.

24 18. Through Plaintiffs' Counsel's investigation an analysis of Defendant's data,
25 Plaintiffs' Counsel gathered evidence sufficient to support a finding that:

- 26 a. Birchbox is an internet-based company that sells men's and
27 women's subscription plans for the monthly delivery of beauty
28

products, including sample make-up and personal care products through its website, www.Birchbox.com.

- b. Birchbox subscriptions renew automatically;
- c. Birchbox's Terms and Conditions and the Birchbox's subscription process failed to disclose the automatic renewal offer in a clear and conspicuous manner and in visual proximity to the request for consent to the offer;
- d. Birchbox failed to obtain the consumers affirmative consent to the automatic renewal offer prior to charging their credit or debit cards; and
- e. Birchbox failed to provide an acknowledgment that included the automatic renewal offer terms, cancellation policy, and information about how to cancel in a manner that is capable of being retained by the consumer.

19. Upon initiation of the named Plaintiffs' individual actions, and particularly after consolidation of Plaintiffs' cases, the parties continuously engaged in discussion and correspondence about the procedural and substantive merits of the case, as well as the costs to the parties of further litigation. Plaintiffs faced the risk of Defendant's motion to transfer venue that was fully briefed prior to the parties' mediation. Defendant has indicated that, if granted, it would then argue that New York law applies according to its governing law provision. Although Plaintiffs dispute Defendant's positions, if Defendant were to be successful in arguing that New York law applies to this action, this would jeopardize Plaintiffs' claims under the ARL or the UCL.

20. Defendant vigorously contests liability, the amount of damages, and the propriety of class certification. Although Plaintiffs dispute Birchbox's positions, they understand and considered the risks. Plaintiffs faced the

1 additional risk that the Court might conclude that the disclosures Birchbox
2 provided fully complied with the ARL and were presented in a clear and
3 conspicuous manner and that subscribers affirmatively consented to the offer
4 before enrolling. Plaintiff also faces the risk that even if Birchbox's
5 disclosures did not strictly comply with the ARL, the Court might conclude
6 that Birchbox complied in good faith and therefore could not be held liable
7 under Bus. & Prof. Code § 17604 (describing good faith compliance
8 doctrine). Further, Plaintiffs face the risk that the Court might conclude that
9 they could not properly seek recovery because they never alleged that they
10 were not aware that Birchbox's subscription renewed automatically. As
11 explained in further detail below, Plaintiffs damages are uncertain and there
12 is a risk that the Court would conclude that the first month and all the months
13 following the second month could not be included in the damages or
14 restitution calculation. Regarding Class certification, Plaintiffs face the risk
15 (in a contested class certification motion) that the Court might conclude that
16 they fail to satisfy the numerous requirements of class certification
17 enumerated in Federal Rule of Civil Procedure 23.

18 21. From these substantive discussions, the parties agreed that that case was
19 appropriate for mediation based on the complexity of issues and high level of
20 risk for both sides. In preparation for the mediation, Defendant produced, as
21 part of an informal and confidential discovery process, an accounting of the
22 number of Class Members likely to be certified in this Action, the type and
23 price of subscriptions purchased by Class Members, the number of initial
24 subscriptions and the number of automatically renewed subscriptions, and
25 Defendant's revenue from these renewals. The parties also participated in
26 numerous telephone calls and e-mail exchanges leading up to the mediation.
27 Plaintiffs' Counsel thoroughly analyzed the information and data contained
28

1 in the information produced in informal discovery to assess the strengths and
2 weaknesses of the claims brought in this Action, and were sufficiently
3 informed to arrive at a realistic settlement valuation of this Action.

4 22. On September 16, 2015, the parties participated in a full-day mediation led
5 by highly skilled and experienced mediator Bruce A. Friedman at JAMS in
6 San Francisco, California. Prior to the mediation, the parties submitted
7 detailed mediation briefs to Mr. Friedman, supported by excerpts of the
8 evidence exchanged during the parties' informal exchange of information and
9 the parties' respective independent research and investigation. I personally
10 attended the mediation, along with co-counsel from H&S, HammondLaw,
11 and Berman DeValerio.

12 23. During the mediation, the parties engaged in extensive arm's-length
13 negotiations in which every aspect of a settlement was contested, including
14 the structure of the Settlement. In discussions regarding the strengths and
15 weaknesses of each other's contentions, Defendant strongly asserted its
16 position that only very limited damages were available, that Class
17 certification was not warranted, and its argument that on the merits Plaintiffs
18 would be unsuccessful.

19 24. While the parties were unable to reach an agreement at the mediation, the
20 parties continued to negotiate in good faith with the mediator's assistance
21 over the months following the mediation. These negotiations included a
22 meeting with Defendant's Counsel, Gavin Rooney, at Defendant's Counsel's
23 office in New York City on October 29, 2015, attended by myself and co-
24 lead counsel Julian Hammond of HammondLaw and one of his associates,
25 during which the parties reached an agreement as to the general terms and
26 structure of the monetary and injunctive relief to be afforded the Class as part
27 of the Settlement.

1 25. This Settlement achieved the goals of the lawsuit through a combination of
2 an agreement to modify Birchbox's subscription checkout flow and to
3 provide a credit to settlement class members for use on the Birchbox
4 website. Specifically, the settlement includes Birchbox's agreement to
5 provide clear and conspicuous disclosures regarding its automatically
6 renewing subscription in the purchase flow and its website Terms and
7 Conditions, and to require consumers to affirmatively consent to Birchbox's
8 Terms and Conditions in compliance with the ARL. These changes were
9 made as a result of this action.

10 26. In addition to these changes, the Settlement provides that all Class Members
11 who do not opt-out with a credit good for the purchase of future products or
12 subscriptions from Birchbox its website. Class Members who subscribed to
13 the Women's Subscription will receive two \$5 credits, to be used separately,
14 equivalent to a total of \$10 credit for each Women's subscriber; and Class
15 Members who subscribed to the Men's Rebillable Subscription will receive
16 two \$10 credits, to be used separately, equivalent to a total of \$20 credit for
17 each Men's Subscriber. These credits represent the value of a one-month
18 subscription for each Class Member. With a total of 147,915 class members
19 (consisting of 138,606 Women's Subscribers and 9,309 Men's Subscribers),
20 the Settlement value is approximately \$1,572,240.00.

21 27. This agreement was reached prior to engaging in any discussions regarding
22 attorneys' fees, costs, or incentive awards to Plaintiffs. Specifically, the
23 proposed attorneys' fees and costs, which shall not to exceed Three Hundred
24 Thousand Dollars (\$300,000) was only discussed after the material terms of
25 the Settlement and the benefit to the Class Members was agreed upon.

26 28. Following the agreement on consideration to the class and injunctive relief,
27 the parties engaged in continuous email and telephonic communications
28

1 between the mediator and the parties regarding attorneys' fees and costs.
2 Finally, on January 7, 2016, the parties agreed to a mediator's proposal of
3 general settlement terms including attorneys' fees, and immediately began
4 drafting a settlement agreement containing all specified terms. After several
5 rounds of revisions, the parties executed the Settlement Agreement now
6 presented to this Court for approval.

7 29. Based on my experience with similar class actions and my investigation,
8 research, and knowledge of the specific facts and legal issues in the Action, I
9 believe that the Settlement Agreement is fair, adequate, reasonable, and
10 appropriate.

11 30. In representing Plaintiffs and conducting negotiations on behalf of the absent
12 putative Class, Plaintiffs' Counsel engaged in the following analysis of the
13 strengths and weaknesses of the substantive and class allegations in this
14 Action.

15 31. The ARL imposes detailed information, notice, and consent requirements on
16 businesses that make automatic renewal or continuous service offers to
17 California consumers. This law was passed in response to increasing
18 complaints from consumers about unwanted charges on their credit cards for
19 products and/or services that they did not explicitly request or know they
20 were agreeing to. The ARL makes it unlawful for businesses to (1) fail to
21 present automatic renewal terms in a "clear and conspicuous manner" before
22 the subscription is fulfilled and in close proximity to the request for consent
23 to the offer; (2) charge a consumer's credit or debit card or third-party
24 account without first obtaining the consumer's affirmative consent to the
25 agreement containing the offer terms; (3) fail to provide a consumer with a
26 retainable acknowledgment containing the terms of the automatically
27 renewing offer and cancellation information.

1 32. Under the ARL, the failure of the offeror of the subscription to comply with
2 the specified notice and consent requirements gives the consumer the right to
3 keep as an unconditional gift whatever the business sent him/her. See Bus. &
4 Prof. Code § 17603. This provision forms the basis for the monetary relief in
5 the Settlement Agreement.

6 33. Although Plaintiffs dispute this, there is a risk that Birchbox may be able to
7 successfully argue that the first month of subscription should not be deemed
8 an unconditional gift because it was not a subscription month that renewed
9 unbeknown to subscribers. Moreover, given that Class Members had
10 Birchbox's goods delivered monthly to their doorsteps, even those Class
11 Members who were unaware of the automatic renewal immediately upon
12 signing up would have learned of it upon receiving the deliveries. Although
13 Plaintiffs dispute the arguments, should the Court adopt such arguments,
14 damages could be limited to a refund of one month subscription. Thus, while
15 Plaintiffs contend that a jury could require Defendant to refund the value of
16 subscription for all automatically renewing months during the Class Period
17 (i.e., the first or second month through the last month of subscription), such a
18 result is not guaranteed.

19 34. The ARL's recently enacted provisions leave many open questions regarding
20 what conduct constitutes a violation, as well as what conditions entitle
21 consumers to a monetary remedy and how it should be calculated. These
22 unsettled questions pose substantial risks to Plaintiff's ability to assure a
23 recovery on behalf of the Class and assure protracted litigation and likely
24 appeals if no settlement was reached. This is especially true in light of the
25 fact that to Plaintiffs' Counsel's knowledge, no plaintiff has yet obtained
26 either class certification or a class-wide remedy by court order in a fully
27 litigated (i.e., not settled) action brought under the ARL.

1 35. The Parties strongly disagree regarding the merits of their respective claims
2 and defenses and there is substantial uncertainty concerning the ultimate
3 outcome, including whether the Actions would proceed in California or New
4 York, and whether the Actions would be certified as a class and allowed to
5 proceed as a class action.

6 36. Further litigation would have also resulted in significant delay. First, the
7 Court would rule on Defendant's pending motion for transfer of venue based
8 on the forum selection clause in its Terms and Conditions that Birchbox
9 argued governed its relationship with Plaintiffs and the Class Members.
10 Defendant has indicated that, if granted, it would then argue that New York
11 law applies pursuant to the governing law provision. Although Plaintiffs
12 dispute Defendant's positions, if Defendant was successful in arguing that
13 New York law applies, this would jeopardize Plaintiffs' claims because New
14 York's auto renewal statute does not provide for damages.

15 37. Further, Plaintiffs would file a motion for class certification. The class
16 certification process and the extensive discovery and briefing required, a
17 process that could take around one year. If the Court denied class
18 certification, Plaintiffs' class claims would be worthless. And if the Court
19 were to certify the proposed classes, trial preparation would require
20 approximately an additional year for further discovery, motion practice, and
21 investigation. At the end of the trial on the merits, Plaintiffs could win and
22 collect for all the months following the initial subscription month, could win
23 and collect the value of one month of subscription only, or lose and collect
24 nothing. Any appeals following trial would only add delay and risk.

25 38. Plaintiffs' Counsel therefore seriously considered the expense, complexity,
26 and delay associated with continued litigation. In response, Plaintiffs'
27 Counsel carefully analyzed the settlement in light of the parties' respective
28

1 positions and elected that the immediate, certain, and substantial payments
2 offered by Defendant to settle this case was fair, reasonable, and adequate
3 relief to the Class.

4 39. Plaintiffs' Counsel considers the settlement in this case to be an excellent
5 result.

6 40. The incentive award of \$2,500 to be paid to each Named Plaintiff is
7 reasonable and fair. The service award is intended to compensate Plaintiffs
8 for the critical role they have each played in this case, the substantial time,
9 effort, and risks undertaken in helping secure the result obtained on behalf of
10 the settlement class. In agreeing to serve as Class Representative, Plaintiffs
11 formally agreed to accept the responsibilities of representing the interests of
12 all Class Members. They assisted Plaintiffs' Counsel in the investigation for
13 the case; assisted in preparing and evaluating the case for mediation; and
14 provided Plaintiffs' Counsel with guidance to evaluate and approve the
15 proposed settlement on behalf of the Settlement Class. Plaintiffs'
16 participation and assistance was critical to the success of this litigation and
17 the enforcement of the ARL protections. Without their commitment to come
18 forward and serve as Class Representatives, this litigation would not be
19 possible. Additionally, Plaintiffs agreed to assume the potential obligation to
20 pay Defendant's costs, a potentially large amount, if they did not prevail at
21 trial. Finally, none of the Plaintiff's claims are antagonistic to the interests of
22 the class. Defendant does not oppose this request.

23 41. The settlement calls for the payment of up to \$300,000 for attorneys' fees and
24 costs. This amount is fair, reasonable, and adequate to compensate Plaintiffs'
25 Counsel for the substantial work devoted to this case and for the out-of-
26 pocket litigation costs paid by counsel, and for the risk assumed in taking on
27 a hotly disputed case brought under a relatively new and untested statute.

1 The attorneys' fees and costs award is intended to reimburse Plaintiffs'
2 Counsel for the litigation costs incurred and for all work already done by
3 counsel as well as for all the work remaining to be done in carrying out and
4 overseeing the notification to the Class Members, communication with Class
5 Members regarding their claims, and the administering of the settlement if it
6 is preliminarily approved. Attorneys' fees and costs were not discussed until
7 all the material terms of the settlement were agreed upon and will be paid by
8 Birchbox, separate and apart from any consideration being paid directly to
9 the Class.

10
11 I declare under penalty of perjury that the foregoing is true and correct.
12 Executed this 2nd day of February 2016, pursuant to the laws of the United States
13 and the State of California at Costa Mesa, California.

14
15 /s/ Abbas Kazerounian

16 ABBAS KAZEROUNIAN, ESQ.

17 ATTORNEY FOR PLAINTIFF TIFFANY LAPUEBLA
18 AND INTERIM CO-LEAD COUNSEL FOR THE CLASS
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**TRACY DAVIS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,**

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

**TIFFANY LAPUEBLA,
INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY
SITUATED,**

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

**Lead Case No.:
3:15-CV-00498-BEN-BGS**

**Case Consolidated with:
3:15-CV-00214-BEN-BGS**

**THIS DOCUMENT RELATES TO: ALL
CASES**

**DECLARATION OF JULIAN
HAMMOND IN SUPPORT OF
PLAINTIFFS' UNOPPOSED
MOTION FOR ORDER GRANTING
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: March 14, 2016

Time: 10:30 a.m.

Courtroom: 5A

Judge: Hon. Roger T. Benitez

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1 I, Julian Hammond, declare as follows:

2 **I. INTRODUCTION**

3 1. I make this Declaration in support of Plaintiffs' Unopposed Motion for
4 Order Granting Preliminary Approval of Class Action Settlement seeking this Court's
5 approval of the Settlement Agreement and Release ("Settlement Agreement") executed
6 by the parties to settle this Action. I am over the age of 18 and have personal knowledge
7 of the facts set forth in this declaration and could and would testify competently to them.

8 2. I am the founding shareholder of the law firm HammondLaw, P.C.
9 ("HammondLaw") and interim co-lead counsel for the named Plaintiffs Tracy Davis and
10 Tiffany LaPuebla ("Plaintiffs" or "Class Representatives") and the proposed Class
11 ("Class" or "Class Members") in the above-captioned action ("Action") against
12 Defendant Birchbox, Inc. ("Defendant" or "Birchbox") for violations of California's
13 Automatic Renewal Law ("ARL"), Cal. Bus. & Prof. Code § 17600 *et seq.*

14 3. I am a member in good standing of the Bar of the State of California. I am
15 licensed to practice before all courts in the State of California. I am also an active
16 member of the Bar of the State of New York, and am admitted to practice as a Barrister-
17 at-Law in both the New South Wales and Victorian Supreme Courts, located in Australia.
18 *See*, true and correct copy of my Resume attached hereto as **EXHIBIT 1**.

19 4. Abbas Kazerounian of Kazerouni Law Group, APC ("KLG") serve with
20 HammondLaw and myself as co-lead counsel for Plaintiffs. Berman DeValerio firm
21 ("Berman") and Hyde & Swigart ("H&S") are co-counsel for Plaintiffs in the Action.
22 HammondLaw, Berman, KLG and H&S are collectively are referred to herein as
23 "Plaintiffs' Counsel." Together, we have worked closely to counsel Plaintiffs
24 particularly as to matters of overall litigation strategy, case evaluation, and class
25 certification.

26 5. I have no knowledge of the existence of any conflict of interest between me,
27 my firm, Plaintiffs' Counsel, and Plaintiffs, on the one hand, and any Class Member, on
28 the other hand.

II. ATTORNEY EXPERIENCE

6. Since founding HammondLaw in 2010, I have devoted a substantial percentage of my practice to litigating wage and hour and consumer violations, the bulk of these being class actions. My firm has successfully represented plaintiffs in class actions brought on behalf of thousands of individuals, and obtained recoveries for those individuals of millions of dollars as well as important programmatic and prospective relief from unlawful corporate practices.

7. Since California's automatic renewal law was introduced in 2010, Plaintiffs' Counsel have been at the forefront of prosecuting defendants for class-wide violations of the statute. HammondLaw and Berman DeValerio have been preliminarily appointed class counsel in *Goldman v. Lifelock*, Case No. 1-15-cv-276235 (Cal. Sup. Ct. Santa Clara Cty.) (automatic renewal law class action brought on behalf of subscribers to Birchbox's identity theft protection programs resulting in a \$2.5 million settlement) and currently serve as putative class counsel in *Mayron v. Google*, Case No. 1-15-cv-275940 (Cal. Sup. Ct. Santa Clara Cty.) (automatic renewal law class action brought on behalf of subscribers to Google's Google Drive storage plan) and *Gargir v. SeaWorld*, Case No. 37-2015-00008175-CU-MC-CTL (Cal. Sup. Ct. San Diego Cty.) (automatic renewal law class action brought on behalf of subscribers to SeaWorld's annual park passes). HammondLaw currently serves as putative class counsel in *Siciliano et al. v. Apple, Inc.*, Case No. 1-13-cv-257676 (Cal. Sup. Ct. Santa Clara Cty.) (automatic renewal law class action brought on behalf of subscribers to Apple's In App subscriptions) and has been appointed class counsel in *Kruger v. Kiwi Crate*, Case No: 1-13-CV-254550 (Santa Clara Sup.Ct. February 19, 2015) (automatic renewal law class action brought on behalf of approximately 5,400 subscribers to Kiwi Crate).

8. HammondLaw has also been certified in numerous other federal and state courts as competent and adequate class counsel. See *Gagner v. Southern Wine & Spirits of America*, Case No. 3:10-cv-10-04405 JSW (N.D. Cal. Dec. 11, 2012) (certifying HammondLaw as co-class counsel for a \$3.5 million settlement reached on behalf of

approximately 870 employees); *Downs, et al. v. US Foodservice*, Case No. 3:10-cv-02163 EMC (N.D. Cal. Sept. 12, 2012) (certifying HammondLaw as co-class counsel for a \$3 million settlement reached on behalf of approximately 950 truck drivers); *Moy, et al. v. Young's Market Co., Inc.*, Case No. 30-2011-00467109- CU-OE-CXC (Cal. Sup. Ct. Orange Cty. Nov. 8, 2013) (certifying HammondLaw as co-class counsel for \$2.3 million settlement on behalf of approximately 575 employees); *Garza, et al. v. Regal Wine Company Inc. & Regal III, LLC*, Case No. RG12657199 (Cal. Sup. Ct. Alameda Cty. Feb. 21, 2014) (certifying HammondLaw as class counsel for a \$1.7 million settlement on behalf of approximately 317 employees); *Lange v. Ricoh Americas Corporation*, Case No. RG136812710 (Cal. Sup. Ct. Alameda Cty. Aug. 18, 2014) (certifying HammondLaw as co-class counsel for an \$898,600 settlement on behalf of approximately 250 employees); *Mayton et al. v. Konica Minolta Business Solutions USA, Inc.*, Case No. RG12657116 (Cal. Sup. Ct. Alameda Cty. June 19, 2015) (certifying HammondLaw as co-class counsel for a \$1,225,000 settlement on behalf of approximately 560 employees); *Kruger v. Kiwi Crate*, Case No 1-13-cv-254550 (Cal. Sup. Ct. Santa Clara Cty July 1, 2015)(certifying HammondLaw as class counsel for ARL settlement on behalf of approximately 8,900 subscribers to Kiwi Crate's monthly delivery of arts and crafts); *Gallardo et al. v. Canon Solutions America, Inc.*, Case No. CIVDSS1500375 (Cal. Sup. Ct. San Bernardino Cty. Aug. 5, 2015) (certifying HammondLaw as co-class counsel for a \$750,000 settlement on behalf of approximately 300 employees); and *Garcia et al v. Sysco Los Angeles, et al.*, Case No. BC560274 (Cal. Sup. Ct. L.A. Cty. Nov. 12, 2015) (certifying HammondLaw and AT as co-class counsel for \$325,000 settlement reached on behalf of approximately 470 truck drivers).

9. HammondLaw also currently serves as putative class counsel in the following pending class actions, among others: *Mead v. Pan-Pacific Petroleum Company, Inc.*, Case No. BC555887 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §§ 1194, 226, and 201-203 putative class action for approximately 200 truck drivers); *Sansinena v. Gazelle Transport*, Case No. S1500CV283400LHB (Cal. Sup. Ct. Kern Cty.) (Labor

Code §§ 1194, 226, and 201-203 putative class action for approximately 150 truck drivers); *Alcazar et al. v. US Foods*, Case No. BC567664 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §2802 putative class action for approximately 750 truck drivers); *Araiza et al. v. The Scotts Company, L.L.C.*, Case No. BC570350 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §2802 putative class action for approximately 100 merchandisers); *Garcia et al. v. Zoom Imaging Solutions, Inc.*, Case No. SCV0035770 (Cal. Sup. Ct. Placer Cty.) (Labor Code § 2802 putative class action for approximately 200 sales representatives and service technicians); *Cooper v. Savage Services*, Case No. BC578990 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §§ 1194, 226, and 201-203 putative class action for approximately 115 truck drivers); *Bowie v. Roadrunner*, Case No. BC586217 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §§ 1194, 226, 201-203, and 2698 *et seq.* putative class action for approximately 500 truck drivers); *Martinez v. Estes West*, Case No. BC587052 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §§ 1194, 226 and 201-203 putative class action for approximately 300 truck drivers); *Numi v. Interstate*, Case No. RG15778541 (Cal. Sup. Ct. Alameda Cty.) (Labor Code §§ 1194, 226, 2802 and 2698 *et seq.* putative class action for approximately 200 truck drivers); *O’Beirne, et al. v. Image Source*, Case No. 30-2015-00801066-CU-OE-CXC (Cal. Sup. Ct. Orange Cty.) (Labor Code § 2802 putative class action for approximately 200 sales representatives); and *Juarugei v. Gaio Trucking*, Case No. BC589878 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §§ 1194, 226, 226.7, 201-203 and 2698 *et seq.* putative class action for approximately 200 truck drivers).

III. INVESTIGATION, DISCOVERY, AND MEDIATION

10. Prior to filing this Action, Plaintiffs’ Counsel investigated and researched the facts and circumstances underlying the pertinent issues and applicable law. This investigation and research included discussions and interviews between Plaintiffs’ Counsel and Plaintiffs and other California consumers who purchased Birchbox subscriptions. Plaintiffs’ Counsel also thoroughly investigated Birchbox’s disclosures presented during the enrollment process and contained in the Terms and Conditions, as well as information sent to members subsequent to enrollment. That investigation

1 included a careful review of the screenshots of the enrollment process as it appeared at
2 the time of Plaintiff's enrollment (and since), copies of various emails sent to Plaintiffs
3 confirming their enrollment, and Birchbox's Terms and Conditions in effect at the time
4 of Plaintiffs' enrollment (and since). Plaintiffs' Counsel also conducted legal research
5 into the applicable law. As a result of this in-depth investigation, Plaintiffs' Counsel
6 determined that Plaintiffs' ARL allegations are based upon identical conduct and well
7 suited for class-wide adjudication, as Class Members experienced the same enrollment
8 path and present identical harm to each Class Member as a result of Birchbox's statutory
9 noncompliance.

10 11. Through their investigation an analysis of Defendant's data, Plaintiffs'
11 Counsel gated evidence sufficient to support a finding that:

12 a. Birchbox is an internet-based company that sells men's and women's
13 subscription plans for the monthly delivery of beauty products, including sample make-
14 up and personal care products through its website, www.Birchbox.com.

15 b. Subscriptions to Birchbox renew automatically;

16 c. Birchbox's Terms and Conditions and the Birchbox's subscription
17 process failed to disclose the automatic renewal offer in a clear and conspicuous manner
18 and in visual proximity to the request for consent to the offer;

19 d. Birchbox failed to obtain the consumers affirmative consent to the
20 automatic renewal offer prior to charging their credit or debit cards; and

21 e. Birchbox failed to provide an acknowledgment that included the
22 automatic renewal offer terms, cancellation policy, and information about how to cancel
23 in a manner that is capable of being retained by the consumer.

24 12. Upon initiation of the Actions, and particularly after consolidation of
25 Plaintiff's cases, the parties continuously engaged in discussion and correspondence
26 about the procedural and substantive merits of the case, as well as the costs to the parties
27 of further litigation. A risk faced by Plaintiffs was Defendant's motion to transfer venue
28 that was fully briefed prior to the parties' mediation. Defendant indicated that, if granted,

1 it would then argue that New York law applies pursuant to the governing law provision.
2 Although Plaintiffs dispute Defendant's positions, if Defendant was successful in arguing
3 that New York law applies, this would jeopardize Plaintiffs' claims as New York law
4 governing automatic renewal subscriptions does not provide for damages.

5 13. Defendant vigorously contests liability, the amount of damages, and the
6 propriety of class certification. Although Plaintiffs dispute Birchbox's positions, they
7 understand and considered the risks. As such, Plaintiffs faced the further risk that the
8 Court might conclude that the disclosures Birchbox provided fully complied with the
9 ARL and were presented in a clear and conspicuous manner and that subscribers
10 affirmatively consented to the offer before enrolling. Plaintiffs also face the risk that even
11 if Birchbox's disclosures did not strictly comply with the ARL, the Court would conclude
12 that Birchbox complied in good faith and therefore could not be held liable under Bus. &
13 Prof. Code § 17604 (describing good faith compliance doctrine). Further, Plaintiffs face
14 the risk that the Court might conclude that they could not properly seek recovery because
15 they never alleged that they were not aware that Birchbox's subscription renewed
16 automatically. As explained in more detail below, damages are uncertain and there is a
17 risk that the Court would conclude that the first month and all the months following the
18 second month could not be included in the damages or restitution calculation. Regarding
19 Class certification, Plaintiffs faces the risk (in a contested class certification motion) that
20 the Court might conclude that they fail to satisfy the numerous requirements of class
21 certification enumerated in Federal Rule of Civil Procedure 23.

22 14. From these substantive discussions, the parties agreed that that case was
23 appropriate for mediation based on the complexity of issues and high level of risk for
24 both sides. In preparation for the mediation, Defendant produced, as part of an informal
25 and confidential discovery process, an accounting of the number of Class Members likely
26 to be certified in this Action, the type and price of subscriptions purchased by Class
27 Members, the number of initial subscriptions and the number of automatically renewed
28 subscriptions, and Defendant's revenue from these renewals. The parties also participated

1 in numerous telephone calls and e-mail exchanges leading up to the mediation. Plaintiffs'
2 Counsel thoroughly analyzed the information and data contained in the information
3 produced in informal discovery to assess the strengths and weaknesses of the claims
4 brought in this Action, and were sufficiently informed to arrive at a realistic settlement
5 valuation of this Action.

6 15. On September 16, 2015, the parties participated in a full-day mediation led
7 by highly skilled and experienced mediator Bruce A. Friedman. Prior to the Mediation,
8 the Parties submitted detailed mediation briefs to Mr. Friedman, supported by excerpts of
9 the evidence exchanged during the parties' informal exchange of information and the
10 parties' respective independent research and investigation. I personally attended the
11 mediation, along my co-counsel from KLG, Berman, and H&S.

12 16. During the mediation, the parties engaged in intensive arm's-length
13 negotiations in which every aspect of a settlement was contested, including the structure
14 of the Settlement. In discussions regarding the strengths and weaknesses of each other's
15 contentions, Defendant strongly asserted its position that only very limited damages were
16 available, that Class certification was not warranted, and its argument that on the merits
17 Plaintiffs would be unsuccessful.

18 17. Being unable to reach an agreement at the mediation session, the parties
19 continued to negotiate in good faith with the mediator's assistance over the months
20 following the mediation. These negotiations included an in-person meeting at
21 Defendant's Counsel office in New York City on October 29, 2015, attended by myself
22 and Abbas Kazerounian of KLG, during which the parties reached an agreement as to the
23 general terms and structure of the monetary and injunctive relief to be afforded the Class
24 as part of the Settlement.

25 18. This settlement achieved the goals of the lawsuit through a combination of
26 an agreement to modify Birchbox's subscription checkout flow and to provide a
27 Birchbox credit to settlement class members. Specifically, the settlement includes
28 Birchbox's agreement to provide clear and conspicuous disclosures regarding its

1 automatically renewing subscription in the purchase flow and its website Terms and
2 Conditions, and to require consumers to affirmatively consent to Birchbox's Terms and
3 Conditions in compliance with the ARL. These changes were made as a result of this
4 action.

5 19. In addition to these changes, the settlement provides all Class Members who
6 do not opt-out with credits good for the purchase of future products or subscriptions from
7 Birchbox its website. Class Members who subscribed to the Women's Rebillable
8 Subscription will each receive a total of \$10 credit, provided in two equal \$5 amounts, to
9 be used separately; and Class Members who subscribed to the Men's Rebillable
10 Subscription will each receive a total of \$20, provided in two equal \$10 amounts, to be
11 used separately. This represents the value of a one-month subscription for each Class
12 Member. With a total of 147,915 class members (including 138,606 Women's
13 subscribers and 9,309 Men's subscribers), the settlement value is approximately
14 \$1,572,240.

15 20. This agreement was reached prior to engaging in any discussions regarding
16 attorneys' fees, costs, or incentive awards to Plaintiffs. Specifically, the proposed fees
17 and costs, which shall not to exceed Three Hundred Thousand Dollars (\$300,000) were
18 not discussed until after the material terms of the Settlement and the benefit to the Class
19 Members was agreed upon.

20 21. Following the agreement on consideration to the class and injunctive relief,
21 the parties engaged in continuous email and telephonic communications between the
22 mediator and the parties regarding attorneys' fees and costs. Finally, on January 7, 2016,
23 the parties agreed to a mediator's proposal of general settlement terms including
24 attorneys' fees, and immediately began drafting a settlement agreement containing all
25 specified terms. After several rounds of revisions, the parties executed the Settlement
26 Agreement now presented to this Court for approval. The Settlement Agreement is
27 attached hereto as **EXHIBIT 2**.
28

IV. FAIRNESS, ADEQUACY, AND REASONABLENESS OF SETTLEMENT

22. Based on my experience with similar class actions and my investigation, research, and knowledge of the specific facts and legal issues in the Action, I believe that the Settlement Agreement is fair, adequate, reasonable, and appropriate.

23. In representing Plaintiffs and conducting negotiations on behalf of the absent putative Class, Plaintiffs' Counsel engaged in the following analysis of the strengths and weaknesses of the substantive and class allegations in this Action.

A. The Strength of Plaintiffs' Case in Light of Settlement

24. The ARL imposes detailed information, notice, and consent requirements on businesses that make automatic renewal or continuous service offers to California consumers. This law was passed in response to increasing complaints from consumers about unwanted charges on their credit cards for products and/or services that they did not explicitly request or know they were agreeing to. The ARL makes it unlawful for businesses to (1) fail to present automatic renewal terms in a "clear and conspicuous manner" before the subscription is fulfilled and in close proximity to the request for consent to the offer; (2) charge a consumer's credit or debit card or third-party account without first obtaining the consumer's affirmative consent to the agreement containing the offer terms; (3) fail to provide a consumer with a retainable acknowledgment containing the terms of the automatically renewing offer and cancellation information.

25. Under the ARL, the failure of the offeror of the subscription to comply with the specified notice and consent requirements gives the consumer the right to keep as an unconditional gift whatever the business sent him/her. See Bus. & Prof. Code § 17603. This provision forms the basis for the monetary relief in the Settlement Agreement.

26. Although Plaintiffs dispute this, there is a risk that Birchbox may be able to successfully argue that the first month of subscription should not be deemed an unconditional gift because it was not a subscription month that renewed unbeknown to subscribers. Moreover, given that Class Members had Birchbox's goods delivered monthly to their doorsteps, even those Class Members who were unaware of the

1 automatic renewal immediately upon signing up would have learned of it upon receiving
2 the deliveries. Although Plaintiffs dispute the arguments, should the Court adopt such
3 arguments, damages could be limited to a refund of one month subscription. Thus, while
4 Plaintiffs contend that a jury could require Defendant to refund the value of subscription
5 for all automatically renewing months during the Class Period (i.e., the first or second
6 month through the last month of subscription), such a result is not guaranteed

7 27. The ARL's recently enacted provisions leave many open questions
8 regarding what conduct constitutes a violation, as well as what conditions entitle
9 consumers to a monetary remedy and how it should be calculated. These unsettled
10 questions pose substantial risks to Plaintiff's ability to assure a recovery on behalf of the
11 Class and assure protracted litigation and likely appeals if no settlement was reached.
12 This is especially true in light of the fact that to Plaintiffs' Counsel's knowledge, no
13 plaintiff has yet obtained either class certification or a class-wide remedy by court order
14 in a fully litigated (i.e., not settled) action brought under the ARL.

15 ***B. Risk, Expense, Complexity, Duration of Litigation and Class Action Status***

16 28. The Parties strongly disagree regarding the merits of their respective claims
17 and defenses and there is substantial uncertainty concerning the ultimate outcome,
18 including whether the Actions would proceed in California or New York, and whether
19 the Actions would be certified as a class and allowed to proceed as a class action.

20 29. Further litigation would have also resulted in significant delay. First, the
21 Court would rule on Defendant's pending motion for transfer of venue based on the
22 forum selection clause in its Terms and Conditions that Birchbox argued governed its
23 relationship with Plaintiffs and the Class Members. Defendant indicated that, if granted,
24 it would then argue that New York law applies pursuant to the governing law provision.
25 Although Plaintiffs dispute Defendant's positions, if Defendant was successful in arguing
26 that New York law applies, this would jeopardize Plaintiffs' claims because New York's
27 auto renewal statute does not provide for damages.

30. Further, Plaintiffs would file a motion for class certification. The class certification process and the extensive discovery and briefing required, a process that could take around one year. If the Court denied class certification, Plaintiffs' class claims would be worthless. And if the Court were to certify the proposed classes, trial preparation would require an additional year for further discovery, motion practice, and investigation. At the end of the trial on the merits, Plaintiffs could win and collect for all the months following the initial subscription month, could win and collect the value of one month of subscription only, or lose and collect nothing. Any appeals following trial would only add delay and risk.

31. Plaintiffs' Counsel therefore seriously considered the expense, complexity, and delay associated with continued litigation. In response, Plaintiffs' Counsel carefully analyzed the settlement in light of the parties' respective positions and elected that the immediate, certain, and substantial payments offered by Defendant to settle this case was fair, reasonable, and adequate relief to the Class.

32. In sum, Plaintiffs' Counsel considers the settlement in this case to be an excellent result.

V. PLAINTIFFS' SERVICE AWARDS

33. The service award of \$2,500 to be paid to each Named Plaintiff is reasonable and fair. The service award is intended to compensate Plaintiffs for the critical role they have each played in this case, the substantial time, effort, and risks undertaken in helping secure the result obtained on behalf of the settlement class. In agreeing to serve as Class Representative, Plaintiffs formally agreed to accept the responsibilities of representing the interests of all Class Members. They assisted Plaintiffs' Counsel in the investigation for the case; assisted in preparing and evaluating the case for mediation; and provided Plaintiffs' Counsel with guidance to evaluate and approve the proposed settlement on behalf of the Settlement Class. Plaintiffs' participation and assistance was critical to the success of this litigation and the enforcement of the ARL protections. Without their commitment to come forward and

1 serve as Class Representatives, this litigation would not be possible. Additionally,
 2 Plaintiffs agreed to assume the potential obligation to pay Defendant's costs, a potentially
 3 large amount, if they did not prevail at trial. Finally, none of the Plaintiff's claims are
 4 antagonistic to the interests of the class. Defendant does not oppose this request.

5 **VI. ATTORNEY'S FEES AND COSTS**

6 34. The settlement calls for the payment of \$300,000 for attorneys' fees and costs.
 7 This amount is fair, reasonable, and adequate to compensate Plaintiffs' Counsel for the
 8 substantial work devoted to this case and for the out-of-pocket litigation costs paid by
 9 counsel, and for the risk assumed in taking on a hotly disputed case brought under a
 10 relatively new and untested statute. The attorneys' fees and costs award is intended to
 11 reimburse Plaintiffs' Counsel for the litigation costs incurred and for all work already
 12 done by counsel as well as for all the work remaining to be done in carrying out and
 13 overseeing the notification to the Class Members, communication with Class Members
 14 regarding their claims, and the administering of the settlement if it is preliminarily
 15 approved. Attorneys' fees and costs were not discussed until all the material terms of the
 16 settlement were agreed upon and will be paid by Birchbox, separate and apart from any
 17 consideration being paid directly to the Class.

18 I declare under penalty of perjury under the laws of the United States and the State
 19 of California that the foregoing is true and correct. Executed on this 2nd day of February
 20 2016 in Baltimore, Maryland.

21 Respectfully submitted,

22 By: s/ Julian Hammond

23 JULIAN HAMMOND, CA Bar No. 268489

24 jhammond@hammondlawpc.com

25 HammondLaw, PC

26 1829 Reisterstown Road, Suite 410

27 Baltimore, MD 21208

28 (310) 601-6766

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ATTORNEY FOR PLAINTIFF TRACY DAVIS AND

INTERIM CO-LEAD COUNSEL FOR THE CLASS

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**TRACY DAVIS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,**

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

**Lead Case No.:
3:15-CV-00498-BEN-BGS**

**Case Consolidated with:
3:15-CV-00214-BEN-BGS**

**THIS DOCUMENT RELATES TO:
ALL CASES**

**APPENDIX OF EXHIBITS TO
THE DECLARATION OF
JULIAN HAMMOND**

**TIFFANY LAPUEBLA,
INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY
SITUATED,**

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

Date: March 14, 2016
Time: 10:30 a.m.
Dept: Courtroom 5A
Judge: Hon. Roger T. Benitez

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APPENDIX

Exhibit	Description	Pages
1	Resume	1-6
2	Settlement Agreement	7-46

PLAINTIFFS' EXHIBIT 1

Resume of Julian Hammond, Esq.

*Tracy Davis,
Individually and On Behalf of
All Others Similarly Situated,*

v.

Birchbox, Inc.

Case No. 3:15-00498-BEN-BGS

AND

*Tiffany Lapuebla
Individually and On Behalf of
All Others Similarly Situated,*

v.

Birchbox, Inc.

Case No. 3:15-00214-BEN-BGS

JULIAN A. HAMMOND
HAMMONDLAW, P.C.

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BAR ADMISSIONS

State of New South Wales, Australia 2000
State of New York, United States of America 2002
State of California, United States of America 2009

AREAS OF PRACTICE

Civil Rights Litigation
Wage & Hour Class Actions
Consumer Fraud Class Actions

EDUCATION

Masters of Law (International Legal Studies), New York University School of Law, August 2001
Bachelors of Law (J.D. equivalent), University of Technology, Sydney (summa cum laude and Law Student Editorial Board), November 1999
Bachelors of Commerce (Accounting/Marketing), University of New South Wales, 1995

PROFESSIONAL SUMMARY

HammondLaw, P.C. 2010 – Present

Boutique Class Action (Wage and Hour and Privacy) Litigation Firm

Activities: Setup and maintain Baltimore office, case selection and sourcing (sourced numerous wage & hour and consumer law class actions), negotiated co-counsel agreements (with Goldstein, Borgen, Dardarian & Ho, Ackermann & Tilajef, and Berman DeValerio), and run all aspects of the litigation.

Case Highlights

Settled Cases

- ***Gagner v. Southern Wine & Spirits of America, Inc.***, Case No. 3:10-cv-10-04405 JSW (N.D. Cal. December 11, 2012) (certifying HammondLaw as co-class counsel for \$3.5 million settlement reached on behalf of approximately 870 sales representatives);
- ***Downs, et al. v. US Foods, Inc. dba US Foodservice***, Case No. 3:10-cv-02163 EMC (N.D. Cal. September 12, 2012) (certifying HammondLaw as co-class counsel for \$3 million settlement reached on behalf of approximately 950 truck drivers);
- ***Moy, et al. v. Young's Market Co., Inc.***, Case No. 30-2011-00467109- CU-OE-CXC (Cal. Sup. Ct. Orange Cty. November 8, 2013) (certifying HammondLaw as co-class counsel for \$2.3 million settlement on behalf of approximately 575 sales representatives);
- ***Garza, et al. v. Regal Wine Company, Inc. & Regal III, LLC***, Case No. RG12657199 (Cal. Sup. Ct. Alameda Cty. February 21, 2014) (certifying HammondLaw as class counsel for \$1.7 million settlement on behalf of approximately 317 employees);
- ***Lange v. Ricoh Americas Corporation***, Case No. RG136812710 (Cal. Sup. Ct. Alameda Cty. August 18, 2014) (certifying HammondLaw as co-class counsel for \$898,600 settlement on behalf of approximately 250 employees).
- ***Kruger v. Kiwi Crate, Inc.*** Case No: 1-13-CV-254550 (Cal. Sup. Ct. Santa Clara Cty. February 19, 2015) (certifying HammondLaw as class counsel for a settlement on behalf of approximately 8,900 subscribers to Kiwi Crate);
- ***Mayton et al v. Konica Minolta Business Solutions USA, Inc.***, Case No. RG12657116 (Cal. Sup. Ct. Alameda Cty. March 4, 2015) (certifying HammondLaw as co-class counsel for \$1,225,000 settlement on behalf for approximately 620 outside sales representatives);

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- ***Cooper et al. v. Savage Services Corporation, Inc.***, Case No. BC578990 (Cal. Sup. Ct. L.A. Cty. October 19, 2015)(certifying HammondLaw as co-class counsel for \$295,000 settlement on behalf of approximately 115 truck drivers);
- ***Gallardo et al. v. Canon Solutions America, Inc.***, Case No. CIVDSS1500375 (Cal. Sup. Ct. San Bernardino Cty. August 5, 2015) (certifying HammondLaw as co-class counsel for \$750,000 settlement on behalf for approximately 320 outside sales representatives);
- ***Glover v. 2020 Companies, Inc.***, Case No. RG14748879 (Cal. Sup. Ct. Alameda Cty. August 3, 2015) (Private Attorney General Act Settlement for \$475,000 on behalf of approximately 273 independent contractors);
- ***Albanez v. Premium Retail Services Inc.***, Case No. RG1577982 (Cal. Sup. Ct. Alameda Cty. January 29, 2016)(Private Attorney General Act Settlement for \$275,000 on behalf of approximately 38 employees);
- ***Garcia et al v. Sysco Los Angeles, et al.***, Case No. BC560274 (Cal. Sup. Ct. L.A. Cty. November 12, 2015) (certifying HammondLaw as class counsel for a \$325,000 settlement on behalf of approximately 500 truck drivers).

Ongoing Cases

- ***O'Beirne et al. v. Copier Source, Inc. dba Image Source, Inc.***, Case No. 30-2015-00801066-CU-OE-CX (Cal. Sup. Ct. Orange Cty.) (Labor Code §2802 putative class action on behalf of approximately 130 outside sales representatives);
- ***Dixon v. Hearst Television, Inc.***, Case No. 15CV000127 (Cal. Sup. Ct. Monterey Cty.) (Labor Code §2802 putative class action on behalf of approximately 45 outside sales representatives);
- ***Bender et al. v. Mr. Copy, Inc.***, Case No. 30-2015-00824068-CU-OE-CXC (Cal. Sup. Ct. Orange Cty.) (Labor Code §2802 putative class action on behalf of approximately 100 outside sales representatives);
- ***Alcazar et al. v. US Foodservice, Inc.***, Case No. BC567664 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §2802 putative class action on behalf of approximately 750 truck drivers);
- ***Garcia et al. v. Zoom Imaging Solutions, Inc.*** SCV0035770 (Cal. Sup. Ct. Placer Cty.) (Labor Code § 510, 512, 1194 and 2802 putative class action on behalf of approximately 165 sales representatives and service technicians);
- ***Araiza et al. v. The Scotts Company, L.L.C.***, Case No. BC570350 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §226, 510, 512 and 2802 putative class action on behalf of approximately 600 merchandisers; Labor Code 226(a) class action on behalf of approximately 180 other salaried employees);
- ***Moss et al. v. USF Reddaway, Inc.***, Case No. 5:15-cv-01541 (C.D.Cal.) (Labor Code §§ 1194, 226, 201-203 and 558 putative class action on behalf of approximately 600 truck drivers);
- ***Harris v. Toyota Logistics, Inc.***, Case No. C 15-00217 (Cal. Sup. Ct. Contra Costa Cty.) (Labor Code §§ 1194, 226, and 201-203 putative class action on behalf of approximately 125 truck drivers);
- ***Keyes v. Valley Farm Transport, Inc.***, Case No. FCS046361 (Cal. Sup. Ct. Solano Cty.) (Labor Code §226, 1194, 512 and 2698 *et seq.* putative class action on behalf of approximately 100 truck drivers);
- ***Mead v. Pan-Pacific Petroleum Company, Inc.***, Case No. BC555887 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §§ 1194, 226, and 201-203 putative class action on behalf of approximately 200 truck drivers);
- ***Bowie v. Roadrunner Transportation Services, Inc.***, Case No. BC586217 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §§ 1194, 226, 201-203 and 558 putative class action on behalf of approximately 500 truck drivers);

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- **Martinez v. Estes West dba G.I. Trucking, Inc.**, Case No. BC587052 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §§ 1194, 226, and 201-203 putative class action on behalf of approximately 300 truck drivers);
- **Cruz v. Blackbelt Enterprises, Inc.**, Case No. 39-2015-00327914-CU-OE-STK (Cal. Sup. Ct. San Joaquin Cty.) (Labor Code §§ 1194, 226, and 201-203 putative class action on behalf of approximately 63 truck drivers);
- **Numi v. Interstate Distributor Co.**, Case No. RG15778541 (Cal. Sup. Ct. Alameda Cty.) (Labor Code §§ 1194, 226, and 558 putative class action on behalf of approximately 1,000 truck drivers);
- **Sansinena v. Gazelle Transport Inc.**, Case No. S1500-CV-283400 (Cal. Sup. Ct. Kern Cty.) (Labor Code §§ 1194, 226, and 201-203 putative class action on behalf of approximately 150 truck drivers);
- **Jauregui v. Gaio Trucking, Inc.**, Case No. BC589878 (Cal. Sup. Ct. L.A. Cty.) (Labor Code §§ 1194, 226, 2802, 201-203 and 2968 *et seq.* putative class action on behalf of approximately 200 truck drivers);
- **Stone v. Interstate Distributor Co.**, Case No. 15-2-1462-8 (Wash. Sup. Ct. Pierce Cty.) (Washington Minimum Wage Act §§ 49.12 and 49.46 *et seq.* putative class action on behalf of approximately 450 truck drivers);
- **Hedglin v. Swift Transportation Company of Arizona, L.L.C.**, Case No. 16-2-04632-6 (Wash. Sup. Ct. Pierce Cty.) (Washington Minimum Wage Act §§ 49.12 and 49.46 *et seq.* putative class action on behalf of approximately 600 truck drivers);
- **Marable v. Postmates, Inc.**, Case No. BC586217 (Cal. Sup. Ct. L.A. Cty.) (Labor Code § 2698 *et seq.* representative action for violation of Labor Code § 226.8 on behalf of Postmates couriers);
- **Keyes v. Vitek, Inc.**, Case No. 2016-00189609 (Cal. Sup. Ct. Sacramento Cty.) (Labor Code § 2698 *et seq.* representative action for violation of Labor Code § 226.8 on behalf of truck drivers);
- **Siciliano et al. v. Apple, Inc.**, Case No. 1-13-cv-257676 (Cal. Sup. Ct. Santa Clara Cty.) (ARL putative class action brought on behalf of California subscribers to Apple's In App subscriptions);
- **Mayron v. Google, Inc.**, Case No. 1-15-cv-275940 (Cal. Sup. Ct. Santa Clara Cty.) (ARL putative class action brought on behalf of California subscribers to Google's Google Drive storage plan);
- **Goldman v. LifeLock, Inc.** Case No. 1-15-cv-276235 (Cal. Sup. Ct. Santa Clara Cty.) (ARL putative class action brought on behalf of California subscribers to Lifelock's identity protection programs);
- **Gargir v. SeaWorld Inc.**, Case No. 37-2015-00008175-CU-MC-CTL (Cal. Sup. Ct. San Diego Cty.) (ARL putative class action brought on behalf of California subscribers to SeaWorld's annual park passes);
- **Davis v. Birchbox, Inc.**, Case No. 3:15-cv-00498-BEN-BGS (S.D. Cal.) (ARL putative class action brought on behalf of California subscribers to Birchbox's monthly delivery of cosmetics);
- **In re Intuit Data Litigation**, Lead Case No. 5:15-cv-01778-EJD (N.D. Cal.) (Nationwide putative class action on behalf of approximately 30 million Turbo tax users alleging that Intuit intentionally allowed criminals to use TurboTax to file fraudulent tax returns and that Intuit failed to protect sensitive and private information from hackers);
- **In re Animation Workers Antitrust Litigation**, Case No. 5:14-cv-04062-LHK (N.D. Cal.) (Anti-trust putative class action on behalf of technical, creative, and other salaried employees who worked for studios including Pixar, Lucasfilm, DreamWorks, Walt Disney, and Sony Pictures alleging that these studios conspired to suppress the employees' pay including by agreeing not to actively recruit each other's employees);

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- ***In re Ashley Madison Customer Data Security Breach Litigation***, Case No. 4:15-cv-02669 JAR (E.D. Mis.)(Nationwide putative class action on behalf of approximately 39 million Ashley Madison users alleging that Ashley Madison failed to protect users' personal information from hackers and defrauded users by employing "fembots" to interact with users); and
- ***In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation***, Case No. 3:15-md-02672-CRB (N.D.Cal.)(Nationwide putative class action on behalf of millions of Volkswagen owners alleging that Volkswagen used a software "defeat device" in its vehicles to cheat emissions standards in violation of federal and state environmental laws and consumer protection laws).

ASSOCIATE/COUNSEL, Ackermann & Tilajef, Los Angeles, California, April 2008 – January 2010

Boutique Employment Litigation Firm

Representative Cases & Activities: Interviewed clients; prepared declarations; and responded to discovery requests; attended depositions; prepared and drafted several Complaints, Class Certifications Motions, Stipulation of Settlements, and Preliminary Approval and Final Approval Motions; attended several mediations; and mentored and trained junior litigators.

Case Highlights

- Successfully represented 311 California truck drivers in a \$1 million class action settlement achieved during private mediation seeking premium pay for missed meal breaks against Southern Wine & Spirits of America;
- Successfully represented 163 California truck drivers in a \$325,000 class action settlement achieved during private mediation for failure to pay minimum wage for time spent doing preliminary and post- work activities in violation of §1194 of the Labor Code against Savage Services Corp;
- Successfully represented 3 Nevada charging parties in a \$90,000 settlement achieved during private mediation in a claim for sexual harassment and a sexually hostile work environment;
- Successfully represented 7 California charging parties in a \$330,000 settlement achieved during private mediation in a claim for sexual harassment and a sexually hostile work environment;
- Successfully represented a single plaintiff in a \$60,000 settlement achieved during private mediation in a case involving failing to reinstate following her taking of FMLA leave;
- Successful represented 3 tow-truck drivers for failing to pay over-time over a period of 4 years (paid on a piece-rate basis) in a \$40,000 settlement;
- Successfully represented single plaintiff in a pregnancy discrimination case; and
- Successfully represented single plaintiff in a case in a retaliation case.

ASSOCIATE, Deacons Solicitors, Melbourne, Australia November 2005- September 2007

National Full-Service Law Firm

Representative Cases & Activities: Drafted answer, interviewed company and expert witnesses; researched and prepared legal memorandum on admissibility of expert opinion evidence on foreign law, researched and gained expertise in FDA and European regulatory filing for new drugs, prepared extensive fact chronologies, and managed extensive electronic discovery.

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Case Highlights

Represented GlaxoSmithKline in one of Australia's largest commercial cases.

BARRISTER, Second and Third Floor Wentworth Chambers, Sydney, Australia March 2003-present

Prestigious Floor of Commercial Trial and Appellate Litigators – International Litigation

Representative Cases & Activities: First chaired 4 cases and second chaired at least 10 cases to judgment in bench trials; argued and prepared for argument various motions, researched and prepared extensive Memorandum of Points and Authorities, prepared declarations and affidavits, developed litigation strategy; and advised institutional clients.

Case Highlights

- Advised institutional investors and prepared complaint in securities class action against listed infrastructure company and its directors alleging misleading and deceptive in relation to Australian Stock Exchange disclosures relating to debt refinancing and accounting disclosures;
 - Advised pollution victims as to the applicability of an International Convention on Civil Liability for Bunker Oil Pollution Damage to the 2009 Queensland Oil Spill;
 - Advised and prepared Complaint for lead plaintiff in a pharmaceutical product liability proceedings against Merck for failure to warn of potential side effects;
 - Advised grandson in relation to rights to interest to his bequeath in a \$25 million Probate proceedings;
 - Successfully represented a executive in a bench trial seeking golden parachute remuneration and other compensation;
 - Successfully represented in 2 separate bench trials commercial landlords in holding over cases by tenants;
 - Successfully represented landowner in a bench trial obtaining a mandatory injunction to remove rock anchors from client's subterranean land;
 - Successfully represented synagogue in a bench trial obtaining revocation of letters of administration suit;
 - Successfully represented 2 clients before the NSW Court of Appeal in common law marriage property distribution suits;
 - Successfully represented Metacash in enforcing a first right of refusal and restraining the sale of the a supermarket;
 - Successfully represented client in seeking just compensation in an Eminent Domain case;
 - Successfully represented client in an Attorney malpractice case;
 - Successful represented commercial landlord seeking various declarations in respect to an Equitable lease;
 - Represented Yeshiva Properties in a claim for breach of contract and in various emergency applications;
- Law Lecturer, University of Technology, Sydney, 2003 Academic Year 2

Prestigious Australian Law School

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Lectured, tutored, and advised Law School Students in Legal History and Jurisprudence and Property Law.

CLERK, His Honorable Justice James, Supreme Court of New South Wales and Court of Criminal Appeal, January 2000 – August 2000

Highest Court in New South Wales (jurisdiction in common law claims over \$750,000, criminal trials carrying a lifetime sentence, and appeals from verdict and/or sentence)

Representative Cases & Activities: Researched, read transcript, sat in court, and assisted in drafting written judgments in a three-week \$1 million breach of contract claim, two week professional legal malpractice case, and two-week defamation case; and researched and assisted in preparing written judgment in several criminal court appeals.

PLAINTIFFS' EXHIBIT 2

Settlement Agreement and Release

***Tracy Davis,
Individually and On Behalf of
All Others Similarly Situated,***

v.

Birchbox, Inc.

Lead Case No. 3:15-00498-BEN-BGS

AND

***Tiffany Lapuebla
Individually and On Behalf of
All Others Similarly Situated,***

v.

Birchbox, Inc.

Consolidated with
Case No. 3:15-00214-BEN-BGS

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("*Agreement*" or "*Settlement Agreement*") is entered into between Plaintiffs Tracy Davis and Tiffany LaPuebla ("*Plaintiffs*"), individually and in their representative capacities as representatives of the putative Class, and Defendant Birchbox, Inc. ("*Birchbox*" or "*Defendant*") (collectively with Plaintiffs, "*Parties*," or any party singularly, "*Party*").

RECITALS

A. Birchbox is an online retailer that offers customers the opportunity to purchase cosmetics and other personal care products. Among other things, Birchbox markets Men's and Women's Rebillable Subscriptions, structured on an Annual or Monthly basis, for the periodic deliveries of personal care products.

B. On May 14, 2015, Plaintiffs filed a consolidated complaint ("*Complaint*") against Birchbox in the United States District Court for the Southern District of California entitled *Davis v. Birchbox, Inc.*, Lead Case No. 3:15-cv-00498-BEN-BGS ("*Action*"). Plaintiffs bring, among other things, the lawsuit individually and on behalf of a California state putative class based on a claim that Birchbox did not comply with the requirements of California Business and Professions Code sections 17600-17606 regarding disclosure, and securing a customer's affirmative consent and acknowledgement of automatic renewal offer terms and cancellation rights in connection with a customer's purchase of Defendant's services, memberships, subscriptions and/or other products. Plaintiffs also assert related claims under California Business and Professions Code sections 17200 and 17535.

C. The Parties have investigated the facts and have analyzed the relevant legal issues regarding the claims and defenses asserted in the Action. The Parties have engaged in informal discovery, including disclosures regarding Birchbox's practices and online disclosures during the relevant time periods.

D. Based on the Parties' investigation, Plaintiffs believe the Action has merit and Birchbox believes the Action has no merit. The Parties also have each considered the uncertainties of trial and the benefits to be obtained under the proposed settlement, and have considered the costs, risks, and delays associated with the continued prosecution of this complex and time-consuming litigation and the likely appeals of any rulings in favor of either Plaintiffs or Birchbox.

E. The Parties participated in mediation with Bruce Friedman, Esq. of JAMS on September 16, 2015, and participated in numerous follow-up calls and meetings. The Parties thereby eventually reached a proposed settlement of this litigation. The Parties negotiated the amount of the attorneys' fees and costs at arms' length and only after they reached an agreement on the major substantive terms of the settlement.

F. Accordingly, it is now the intention of the Parties and the objective of this Agreement to avoid the costs of trial and settle and dispose of, fully and completely and forever, any and all claims and causes of action asserted or that could have been asserted in the Action.

AGREEMENT

1. **DEFINITIONS.** The following section defines terms not previously defined above. Some definitions use terms that are defined later in this section:

1.1 The terms “*Class*” includes all persons who disclosed a California billing address when ordering an Annual or Monthly Rebillable Subscription from Birchbox, including Men’s and Women’s Rebillable Subscriptions, and that automatically renewed at any time between January 1, 2011 and March 6, 2015. “*Class Member*” or “*Class Members*” refer to persons who fall within the definition of the Class. According to Birchbox’s records, there are 138,606 Class Members who subscribed to the Woman’s Rebillable Subscription and 9,309 Class Members who subscribed to the Men’s Rebillable Subscription.

1.2 The term “*Class Counsel*” means the law firms of HammondLaw, P.C. and Kazerouni Law Group, APC.

1.3 The term “*Court*” means the United States District Court for the Southern District of California.

1.4 The terms “*Birchbox’s Counsel*” and “*Defendant’s Counsel*” means the law firm of Lowenstein Sandler LLP.

1.5 The term “*Fairness Hearing*” means the hearing at which the Court decides whether to approve this Agreement as a fair, reasonable, and adequate settlement.

1.6 The term “*Final Order and Judgment*” means a proposed order and judgment approving the Settlement of this Action. The order submitted by the Plaintiffs with their motion for final approval of the settlement at the Fairness Hearing must be substantially similar to the form attached as Exhibit D.

1.7 The term “*Final Settlement Date*” shall mean the date two (2) Court days after: (a) sixty-one (61) calendar days after the entry of the Final Order and Judgment, if no timely motions for reconsideration or no appeals or other efforts to obtain review have been filed including any appeals or efforts to obtain review of an attorneys’ fees award or award of incentive compensation to the named plaintiffs, or (b) in the event that an appeal or other effort to obtain review has been initiated, the date sixty-one (61) calendar days after such appeal or other review has been finally concluded in favor of the Final Order and Judgment and the Final Order and Judgment is no longer subject to review, whether by appeal, petitions for rehearing, petitions for rehearing en banc, petitions for certiorari, or otherwise.

1.8 The term “*Internet Posting*” means a website set up by the Settlement Administrator for the sole purpose of providing the Class with notice of the proposed settlement.

1.9 The term “*Long-Form Notice*” means the legal notice of the proposed settlement terms, as approved by Class Counsel, Defendant’s Counsel, and the Court, to be provided to Class Members under paragraph 3.3. The Long-Form Notice submitted by the Plaintiffs to the Court for preliminary approval must be substantially similar to the form attached as Exhibit B.

1.10 The terms “*Preliminary Approval and Provisional Class Certification Order*” and “*Preliminary Approval Order*” mean a proposed order preliminarily approving the settlement of this Action and provisionally certifying the Class. This order proposed by the Plaintiffs to the Court must be substantially similar to the form attached as Exhibit A.

1.11 The term “*Email Notice*” means the legal notice summarizing the proposed settlement terms, as approved by Class Counsel, Defendant’s Counsel, and the Court, to be provided to Class Members under section 3.3 by email. The Email Notice proposed by the Plaintiffs to the Court for preliminary approval must be substantially similar to the form attached as Exhibit C.

1.12 The term “*Settlement Administrator*” means Dahl Administration and any successors to that entity that Birchbox may subsequently designate, with notice to and consent from Plaintiffs (whose consent will not be unreasonably delayed or withheld), to administer the claims process provided for in the Agreement.

2. SETTLEMENT TERMS.

2.1 Relief Provided to the Settlement Class. Each Class Member who does not seek exclusion pursuant to section 3.6 below will receive a credit good for the purchase of future products or subscriptions from Birchbox through the Birchbox.com website. Class Members who subscribed to the Women’s Rebillable Subscription (Annual or Monthly) will receive a \$10 credit each, and Class Members who subscribed to the Men’s Rebillable Subscription (Annual or Monthly) will receive a \$20 credit each.

- (a) **Manner of Transmission of the Credit.** These credits shall be provided to Class Members by email, distributed by the Settlement Administrator, providing codes that Class Members may utilize on Birchbox.com to purchase products or pay for subscriptions. The credits shall be provided in two equal amounts, to be used separately; specifically, two \$5 credits for Women’s Rebillable Subscription Class Members and two \$10 credits for Men’s Rebillable Subscription Class Members.
- (b) **Nature of the Credits.** These credits shall be one-use only (unused balances cannot be carried to future purchases) and non-transferrable.
- (c) **Timing of Transmission of the Credit.** Credits shall be emailed to Class Members by the Settlement Administrator on or before twenty (20) calendar days after the Final Settlement Date.

- (d) **Time to Utilize Credits.** Class Members shall have one (1) year from when the credits are first emailed to the Class Member within which to utilize the credits.
- (e) **Bounced Back or Non-delivered Emails.** In the event that an email providing a credit is bounced back or otherwise not delivered, the Settlement Administrator shall send one notice and request to cure by email to the email address used to send the Email Notice referenced in Section 3.3. The notices and requests for cures must be sent at the earliest possible convenience, and in no event later than forty (40) calendar days after the Final Settlement Date. The Class Member shall then have two (2) weeks from the date the notice referenced in this Section 2.1(d) is provided to contact the Settlement Administrator with updated information.

2.2 Business Practices.

- (a) For eighteen (18) months after the entry of the Preliminary Approval Order, Birchbox will implement the following business practices:
 - (i) **Content.** The disclosures in the purchase flow for Birchbox's Women's and Men's Rebillable Subscriptions that automatically renew shall state: (i) that the subscription will continue until the consumer cancels, (ii) a description of the cancellation policy that applies to the offer, (iii) that recurring charges will be charged to the consumer's credit or debit card, and (iv) the length of the automatic renewal term. Language that is substantially similar to the language included in this subsection 2.2(a) shall be sufficient to comply with this paragraph.
 - (ii) **Location.** The disclosures identified in subsection 2.2(a) shall be presented before the customer's credit or debit card is charged and in visual proximity to the request for the consumer to consent to purchase the Women's or Men's Rebillable Subscriptions.
 - (iii) **Prominence.** The disclosures identified in subsection 2.2(a) shall be in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language.
 - (iv) **Website Terms and Conditions.** The disclosures identified in subsection 2.2(a) shall also appear in the Birchbox website Terms and Conditions.
 - (v) **Assent.** Before the customer's credit or debit card is charged, a customer will be required to affirmatively consent to the Birchbox website's Terms and Conditions.

- (vi) **Acknowledgement.** Birchbox shall provide an acknowledgment that includes the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer. If the offer includes a free trial, Birchbox shall also disclose in the acknowledgment how to cancel and allow the consumer to cancel before the consumer pays for the goods or services.
- (b) Attached to this agreement as Exhibit E is a copy of the Birchbox purchase flow for monthly subscriptions, that is sufficient to comply with Section 2 of this Settlement Agreement, and that will be utilized by Birchbox within forty-five (45) days of the entry of the Preliminary Approval Order.
- (c) This Settlement Agreement and any of Birchbox's changes in policies, practices, and procedures does not impose any obligations on Birchbox beyond the requirements of California Business and Professions Code section 17600 *et seq.* Further, to the extent there is any change in federal or state law (either by statutory or regulatory amendment or by court opinion) regarding the subject matter of Section 2.2, Birchbox is permitted to amend its practices and procedures to parallel such change in federal or state law. Finally, this Settlement Agreement in no way requires [1] Birchbox to continue to sell merchandise to the public or operate a website; or [2] to continue to use the mock up attached as Exhibit E, so long as any changes Birchbox makes to its website are not contradictory to the terms within Section 2 of this Settlement Agreement.
- (d) Defendant acknowledges that the aforementioned amendments to its enrollment processes and the Birchbox website's Terms and Conditions that highlight and clarify the recurring nature of its membership and its cancellation policy are made as a result of this Action.

2.3 Attorneys' Fees and Costs.

- (a) Payment of attorneys' fees and costs to Class Counsel is subject to Court review and approval. Birchbox agrees not to oppose Class Counsel's application for attorneys' fees and costs of up to \$300,000. Birchbox shall not have any responsibility or liability for paying attorney's fees in excess of this amount. Plaintiffs, Class Counsel, and all the signatories hereto agree not to petition the Court for more than \$300,000 total for attorneys' fees and costs, and further represent and warrant that they are aware of no other attorneys or law firms that would have a basis to apply for fees here apart from the signatories to this Agreement. Class Counsel will file any papers supporting its request for attorneys' fees and costs with the Court at least fourteen (14) calendar days prior to the deadline for Class Members

to object to the Settlement, as such deadline is defined in Section 3.8 below.

- (b) If the Court approves the Settlement of this Action and a payment of attorneys' fees and costs to Class Counsel, and subject to Section 2.3(c), below, Birchbox agrees to pay the fees and costs award approved by the Court up to a maximum of \$300,000. Birchbox shall cause the payment to be made to HammondLaw, PC within five (5) business days after the Final Settlement Date. Class Counsel agrees to provide Birchbox with its executed W-9 Form at least fifteen (15) calendar days before any payment to it under this paragraph is due.
- (c) HammondLaw, PC shall have control over and responsibility to distribute any payment of fees and costs to any other attorney or law firm that may claim entitlement to fees and costs under this settlement or as a result of the Action.

2.4 Incentive Award to Plaintiffs. Payment of an incentive award to Plaintiffs is subject to Court review and approval. Birchbox agrees not to oppose Plaintiffs' application for an incentive award of up to \$2,500 for each Plaintiff. Birchbox shall not have any responsibility or liability for paying incentive awards in excess of this amount. Plaintiffs and Class Counsel agree to not petition the Court for an incentive award of more than \$2,500 for each Plaintiff. If the Court approves the Settlement of this Action and an incentive award to Plaintiffs, Birchbox agrees to pay the incentive award approved by the Court up to \$2,500 to each Plaintiff within five (5) business days after the Final Settlement Date or the date each Plaintiff provides Birchbox with their executed W-9 Form, whichever is later. Plaintiffs contend such payment is made in recognition of the Plaintiffs' efforts and activities in furtherance of both the litigation of this Action and its ultimate resolution.

2.5 Settlement Implementation Costs. Birchbox will pay all reasonable settlement administration costs and the cost of providing notice of the proposed settlement to the Class.

2.6 Reduction in Plaintiffs' Incentive Award or Class Counsel's Attorneys' Fees or Costs. A reduction by the Court or by an appellate court of the attorneys' fees or costs sought by Class Counsel or the incentive award sought by Plaintiffs shall not affect any of the Parties' other rights and obligations under this Settlement Agreement.

3. CLASS SETTLEMENT PROCEDURES.

3.1 Cooperation to Obtain Court Approval. The Parties will jointly take all reasonable steps necessary to secure the Court's approval of this Agreement and settlement.

3.2 Preliminary Approval and Provisional Class Certification. As soon as practicable after this Agreement is signed, Plaintiffs must apply for preliminary approval of the class action settlement and provisional class certification. The application must ask the Court to:

- (a) preliminarily approve this Agreement as being within the range of possible approval as fair, reasonable, and adequate;
- (b) preliminarily approve the form, method of providing notice and content of the Long-Form Notice and Email Notice described in paragraph 3.3 and attached as Exhibits B and C;
- (c) stay all proceedings in the Action until the Court renders a final decision on approval of the settlement;
- (d) set the date and time of the Fairness Hearing between one hundred and ten (110) and one hundred and twenty-five (125) calendar days after entry of the Preliminary Approval Order, subject to the Court's availability;
- (e) provisionally certify the Class under Federal Rule of Civil Procedure 23 for settlement purposes only;
- (f) appoint Plaintiffs as class representatives for settlement purposes only; and
- (g) appoint the law firms of HammondLaw, PC, Kazerouni Law Group, APC, Berman DeValerio, and Hyde & Swigart, APC, as Class Counsel for settlement purposes only.

The proposed Preliminary Approval and Provisional Class Certification Order must be substantially similar to the form attached as Exhibit A. Class Counsel must draft the application papers and give Defendant's Counsel drafts of the application and proposed order to review at least seven (7) calendar days before the filing deadline. Birchbox shall be permitted, but not required, to file its own brief in support of the Preliminary Approval Order. If Birchbox does not file such a brief, it shall be presumed that Birchbox supports or does not oppose the granting of preliminary approval of the settlement.

3.3 Notice. Subject to the Court entering the proposed Preliminary Approval Order in the form attached as Exhibit A, the Parties agree that the Settlement Administrator will provide the Class with notice of the proposed Settlement by the following methods.

- (a) **Class Data.** No later than ten (10) calendar days after entry of the Preliminary Approval Order, Birchbox shall provide Email addresses for all Class Members to the Settlement Administrator.
- (b) **Internet Posting.** Starting no later than thirty (30) calendar days after entry of the Preliminary Approval Order, the Settlement Administrator will operate a website solely for the purposes of providing the Class notice of the Settlement. The Internet Posting will contain the Long-Form Notice, the Complaint, and the Preliminary Approval Order. Within five (5) calendar days after Plaintiffs or Class Counsel files the motion for attorneys' fees and costs, the Internet Posting will also post the fees and

costs motion. The Long-Form Notice will be substantially similar to the form attached as Exhibit B.

- (c) **Notice.** Upon the Internet Posting being activated, and no later than thirty-seven (37) calendar days after entry of the Preliminary Approval Order, the Settlement Administrator shall send the Email Notice to Class Members at the most recent email address for the Class Members that is contained in Birchbox's records. The Settlement Administrator shall send the Email Notice a second time to Class Members at the most recent email address for the Class Members that is contained in Birchbox's records within twenty (20) calendar days after the first Email Notice is sent. The Email Notice will be substantially similar to the form attached as Exhibit C, and will provide the web address of the Internet Posting and a mailing address to contact the Settlement Administrator. For those e-mails that bounce back, the Settlement Administrator shall mail a postcard to the most recent mailing address for the Class Members that is contained in Birchbox's records. If the postcard is returned without a forwarding address, the Settlement Administrator will immediately conduct a standard skip trace in an effort to ascertain the current address for the particular Class Member and resend the postcard within 3 days of its return.

3.4 Proof of Notice. No later than seven (7) calendar days before the filing date for Plaintiffs' motion in support of the Final Order and Judgment, the Settlement Administrator must serve a declaration(s) on Class Counsel and Birchbox confirming that the Settlement Administrator provided the Class with notice of the proposed settlement in accordance with paragraph 3.3.

3.5 Objections. Any Class Member who has not requested exclusion from the Class and who wants to object to the Settlement Agreement must mail a written objection to Class Counsel and Defendant's Counsel, no later than ninety (90) calendar days after entry of the Preliminary Approval Order. The delivery date is deemed to be the date the objection is deposited in the U.S. Mail as evidenced by the postmark. Written objections must include: (a) the name and case number of the Action, "*Davis v. Birchbox, Inc.*, United States District Court, Southern District of California, Civil Action No. 3:14-cv-00498-BEN-BGS"; (b) the full name, address, email address, and telephone number of the person objecting; (c) the words "Notice of Objection" or "Formal Objection," and (d) in clear and concise terms, the legal and factual arguments supporting the objection, including an attestation, under the penalty of perjury, of facts demonstrating that the person objecting is a Class Member. Any Class Member that mails a written objection as described in this paragraph has the option to appear at the Fairness Hearing, either in person or through counsel hired at the Class Member's expense, to object to the Settlement Agreement, as long as the Class Members or their attorneys intending to make an appearance at the Fairness Hearing so indicated in their objection under a heading of "Notice of Intent to Appear." Only Class Members who timely mail objections containing Notices of Intent to Appear may speak at the Fairness Hearing. Class Members who fail to submit written objections as described in this paragraph will be deemed to have waived any objections and will be foreclosed from making any objections (whether by a subsequent objection, intervention,

appeal, or any other process) to the Agreement and the Class Member asserting such an objection shall be bound by the final determination of the Court.

3.6 Exclusion Requests. Class Members may elect not to be part of the Class and not to be bound by this Agreement. To make this election, Class Members must send a letter or postcard to the Settlement Administrator stating (a) the name and case number of the Actions, “*Davis Birchbox, Inc.*, United States District Court, Southern District of California, Civil Action No. 3:14-cv-00498-BEN-BGS”; (b) the full name, address, email address, and telephone number of the person requesting exclusion; and (c) a statement that he/she does not wish to participate in the Settlement, postmarked no later than ninety (90) calendar days after entry of the Preliminary Approval Order.

- (a) **Exclusion List.** The Settlement Administrator must serve on Birchbox and Class Counsel a list of Class Members who have timely and validly excluded themselves from the Class no later than ten (10) calendar days before the filing date for Plaintiffs’ motion in support of the Final Order and Judgment.
- (b) **Termination of Agreement.** Despite this Agreement, if more than five percent (5%) of Class Members request exclusion, then Birchbox may, in its sole discretion, at any time before the Fairness Hearing, notify Class Counsel in writing that it has elected to terminate this Agreement. If this Agreement is terminated, it will be deemed null and void *ab initio*. In that event: (i) the Preliminary Approval Order and all of its provisions will be vacated by its own terms; (ii) the Action will revert to the status that existed before the Agreement’s execution date; and (iii) no term or draft of this Agreement, or any part or aspect of the Parties’ Settlement discussions, negotiations, or documentation will have any effect or be admissible into evidence, for any purpose, in this Action or any other proceeding.

3.7 Final Order and Judgment. Before the Fairness Hearing, Plaintiffs must apply for Court approval of a proposed Final Order and Judgment, substantially similar to the form attached as Exhibit D. Class Counsel must file with the Court a complete list of all Class Members who have validly and timely excluded themselves from the Class. Class Counsel must also draft the motion for final approval or application papers and provide Defendant’s Counsel with drafts of the motion or application and proposed order to review at least seven (7) calendar days before the filing deadline. Birchbox shall be permitted, but not required, to file its own brief in support of the Final Order and Judgment. If Birchbox does not file such a brief, it shall be presumed that Birchbox supports or does not oppose the granting of final approval of the settlement.

3.8 Action Status if Settlement Not Approved. This Agreement is being entered into for settlement purposes only. If the Court conditions its approval of either the Preliminary Approval Order or the Final Order and Judgment on any modifications of this Agreement that are not acceptable to all Parties, or if the Court does not approve the settlement or enter the Final Order and Judgment, or if the Final Settlement Date does not occur for any

reason, then this Agreement will be deemed null and void *ab initio*. In that event (a) the Preliminary Approval Order and/or Final Order and Judgment and all of its or their provisions will be vacated by its or their own terms, including, but not limited to, vacating conditional certification of the Class, conditional appointment of Plaintiffs as class representatives and conditional appointment of Plaintiffs' Counsel as Class Counsel, (b) the Action will revert to the status that existed before the Agreement's execution date, and (c) no term or draft of this Agreement, or any part of the Parties' Settlement discussions, negotiations or documentation will have any effect or be admissible into evidence for any purpose in the Action or any other proceeding. If the Court does not approve the settlement or enter the Final Order and Judgment for any reason, or if the Final Settlement Date does not occur for any reason, Birchbox shall retain all its rights to object to the maintenance of the Action as a class action, and nothing in this Agreement or other papers or proceedings related to the Settlement shall be used as evidence or argument by any Party concerning whether the Action may properly be maintained as a class action.

4. ENTRY OF JUDGMENT AND RELEASES.

4.1 Judgment and Enforcement. The Parties agree that should the Court grant final approval of the proposed settlement and enter judgment, the judgment shall include a provision for the retention of the Court's jurisdiction over the Parties to enforce the terms of the judgment.

4.2 Class Members' Release. Upon entry of the Final Order and Judgment following the Fairness Hearing, all Class Members who have not timely requested exclusion pursuant to Section 3.6, and each of their successors, assigns, heirs, and personal representatives, release and forever discharge Birchbox, Inc. and each of its direct or indirect parents, wholly or majority-owned subsidiaries, affiliated and related entities, predecessors, successors and assigns, partners, privities, and any of their present and former directors, officers, employees, shareholders, agents, representatives, attorneys, accountants, insurers, and all persons acting by, through, under or in concert with them, or any of them, from all manner of action, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, penalties, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent related to or arising out of the claims, causes of action or demands that (a) were asserted in the Action, or (b) that arise from or are related to this Action or are reasonably related to any of the allegations in Plaintiffs' Consolidated Complaint, even if such claims were not asserted in this Action, including claims for alleged fraud in the sale of periodic subscriptions and alleged failures in relation to obtaining Class Members' affirmative consent to an agreement containing automatic renewal terms. To the fullest extent permitted by law, the Plaintiffs and the settling Class Members agree not to commence or participate in any claim, demand, grievance, action, or other proceeding based upon the claims being released.

4.3 Named Plaintiffs' Release. Upon entry of the Final Order and Judgment following the Fairness Hearing, Plaintiffs, and each of their successors, assigns, legatees, heirs, and personal representatives release and forever discharge Birchbox, Inc. and each of its direct or indirect parents, wholly or majority-owned subsidiaries, affiliated and related entities, predecessors, successors and assigns, partners, privities, and any of their present and former

directors, officers, employees, shareholders, agents, representatives, attorneys, accountants, insurers, and all persons acting by, through, under or in concert with them, or any of them, from all manner of action, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, penalties, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent.

In addition, Plaintiffs, and each of Plaintiffs' successors, assigns, legatees, heirs, and personal representatives, expressly waive and relinquish, to the fullest extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Plaintiffs fully understands that the facts on which the Agreement is executed may be different from the facts now believed by Plaintiffs' and her counsel to be true and expressly accepts and assumes the risk of this possible difference in facts and agrees that the Agreement will remain effective despite any difference in facts. Further, Plaintiffs agrees that this waiver is an essential and material term of this release and the Settlement that underlies it and that without such waiver the settlement would not have been accepted.

5. ADDITIONAL PROVISIONS.

5.1 Birchbox's Denial of Wrongdoing. This Agreement reflects the Parties' compromise and Settlement of the disputed claims. Its provisions, and all related drafts, communications and discussions, cannot be construed as or deemed to be evidence of an admission or concession of any point of fact or law regarding wrongdoing by Birchbox, or matters respecting class certification, by any person or entity and cannot be offered or received into evidence or requested in discovery in this Action or any other action or proceeding as evidence of any such admission or concession.

5.2 Change of Time Periods. All time periods and dates described in this Settlement Agreement are subject to the Court's approval. These time periods and dates may be changed by the Court or by the Parties' written agreement without notice to the Class. The Parties reserve the right, subject to the Court's approval, to make any reasonable extensions of time that might be necessary to carry out any provisions of this Agreement.

5.3 Real Parties in Interest. In executing this Agreement, the Parties warrant and represent that they, including Plaintiffs in their representative capacities on behalf of the Class, are the only persons having any interest in the claims asserted in this Action. Neither these claims, nor any part of these claims, have been assigned, granted, or transferred in any way to any other person, firm, or entity.

5.4 Voluntary Agreement. The Parties executed this Agreement voluntarily and without duress or undue influence.

5.5 Binding on Successors. This Agreement binds and benefits the Parties' respective successors, assigns, legatees, heirs, and personal representatives.

5.6 Parties Represented by Counsel. The Parties acknowledge that: (a) they have been represented by independent counsel of their own choosing during the negotiation of this Settlement and the preparation of this Agreement; (b) they have read this Agreement and are fully aware of its contents; and (c) their respective counsel fully explained to them the Agreement and its legal effect.

5.7 Authorization. Each Party warrants and represents that there are no liens or claims of lien or assignments, in law or equity, against any of the claims or causes of action released by this Agreement and, further, that each Party is fully entitled and duly authorized to give this complete and final release and discharge.

5.8 Entire Agreement. This Agreement and attached exhibits contain the entire agreement between the Parties and constitute the complete, final, and exclusive embodiment of their agreement with respect to the Action. This Agreement is executed without reliance on any promise, representation, or warranty by any Party or any Party's representative other than those expressly set forth in this Agreement.

5.9 Construction and Interpretation. Neither a Party nor any of the Parties' respective attorneys will be deemed the drafter of this Agreement for purposes of interpreting any provision in this Agreement in any judicial or other proceeding that may arise between them. This Agreement has been, and must be construed to have been, drafted by all the Parties to it, so that any rule that construes ambiguities against the drafter will have no force or effect.

5.10 Headings and Formatting of Definitions. The various headings used in this Settlement Agreement are solely for the Parties' convenience and may not be used to interpret this Settlement Agreement. Similarly, bolding and italicizing of definitional words and phrases is solely for the Parties' convenience and may not be used to interpret this Settlement Agreement. The headings and the formatting of the text in the definitions do not define, limit, extend, or describe the Parties' intent or the scope of this Settlement Agreement.

5.11 Exhibits. The exhibits to this Agreement are integral parts of the Agreement and Settlement and are incorporated into this Agreement as though fully set forth in the Agreement.

5.12 Modifications and Amendments. No amendment, change, or modification to this Agreement will be valid unless in writing signed by the Parties or their counsel.

5.13 Privilege Retained. Nothing in this Agreement, the negotiations, and the mediation relating thereto is intended to or shall be deemed to constitute a waiver of any applicable privilege or immunity, including without limitation the attorney-client privilege or work product immunity, by any Party.

5.14 Governing Law. This Agreement is governed by California law and must be interpreted under California law and without regard to conflict of laws principles.

5.15 Grammar. The neuter form of a pronoun shall be considered to include within its meaning the masculine and feminine forms of the pronoun, and vice versa.

5.16 Further Assurances. The Parties must execute and deliver any additional papers, documents, and other assurances, and must do any other acts reasonably necessary, to perform their obligations under this Agreement and to carry out this Agreement's expressed intent.

5.17 Agreement Constitutes a Complete Defense. To the extent permitted by law, this Agreement may be pled as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit, or other proceedings that may be instituted, prosecuted or attempted in breach of or contrary to this Agreement.

5.18 Execution Date. This Agreement is deemed executed on the date the Agreement is signed by all of the undersigned.

5.19 Counterparts. This Agreement may be executed in counterparts, each of which constitutes an original, but all of which together constitute one and the same instrument. Several signature pages may be collected and annexed to one or more documents to form a complete counterpart. Photocopies and PDFs of executed copies of this Agreement may be treated as originals.

5.20 Recitals. The Recitals are incorporated by this reference and are part of the Agreement.

5.21 Severability. If any provision of this Settlement is declared by the Court to be invalid, void, or unenforceable, the remaining provisions of this Settlement will continue in full force and effect, unless the provision declared to be invalid, void, or unenforceable is material, at which point the Parties shall attempt to renegotiate the Settlement or, if that proves unavailing, either Party can terminate the Agreement without prejudice to any Party.

5.22 Inadmissibility. This Agreement (whether approved or not approved, revoked, or made ineffective for any reason) and any proceedings or discussions related to this Agreement are inadmissible as evidence of any liability or wrongdoing whatsoever in any Court or tribunal in any state, territory, or jurisdiction. Further, neither this Agreement, the Settlement contemplated by it, nor any proceedings taken under it, will be construed or offered or received into evidence as an admission, concession or presumption that class certification is appropriate, except to the extent necessary to consummate this Agreement and the binding effect of the Final Order and Judgment.

5.23 No Conflict Intended. Any inconsistency between this Agreement and the attached exhibits will be resolved in favor of this Agreement.

5.24 List of Exhibits: The following exhibits are attached to this Agreement:

Exhibit A - [Proposed] Preliminary Approval Order

Exhibit B - Long-Form Notice

Exhibit C - Email Notice

Exhibit D - [Proposed] Final Order and Judgment

Exhibit E - Revised Check Out Flow for Birchbox Website

The Parties have agreed to the terms of this Agreement and have signed below.

Dated: January __, 2016

Tracy Davis

Dated: January __, 2016

Tiffany LaPuebla

HAMMONDLAW, P.C.

Dated: January __, 2016

By: _____
Julian Hammond, Esq.
Attorneys for Plaintiffs

KAZEROUNI LAW GROUP, APC

Dated: January __, 2016

By: _____
Abbas Kazerounian, Esq.
Attorneys for Plaintiffs

BERMAN DEVALERIO

Dated: January __, 2016

By: _____
Todd Seaver
Attorneys for Plaintiffs

HYDE & SWIGART, APC

Dated: January __, 2016

By: _____
Joshua B. Swigart, Esq.
Attorney for Plaintiffs

BIRCHBOX, INC


Dated: January __, 2016

By: _____
Title: RAIG M. ABBEY
GENERAL COUNSEL
CORP. SECRETARY

The Parties have agreed to the terms of this Agreement and have signed below.

2/2/2016

Dated: January __, 2016


DocuSigned by:

40020AF74277471...
Tracy Davis

Dated: January __, 2016

Tiffany LaPuebla

HAMMONDLAW, P.C.

Dated: January __, 2016

By: 
Julian Hammond, Esq.
Attorneys for Plaintiffs

KAZEROUNI LAW GROUP, APC

Dated: January __, 2016

By: _____
Abbas Kazerounian, Esq.
Attorneys for Plaintiffs

BERMAN DEVALERIO

Dated: January __, 2016

By: _____
Todd Seaver
Attorneys for Plaintiffs

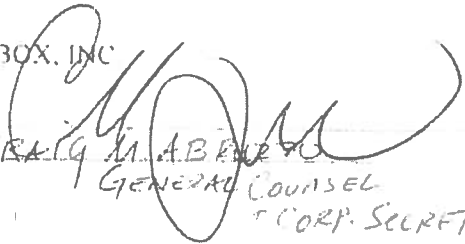
HYDE & SWIGART, APC

Dated: January __, 2016

By: _____
Joshua B. Swigart, Esq.
Attorney for Plaintiffs

BIRCHBOX, INC

Dated: January __, 2016

By: 
Title: CRAIG M. ABNER
GENERAL COUNSEL
CORP. SECRETARY

The Parties have agreed to the terms of this Agreement and have signed below.

Dated: January , 2016

Tracy Davis

Dated: January , 2016


Tiffany LaPue

HAMMONDLAW, P.C.

Dated: January , 2016

By

Julian Hammond, Esq.
Attorneys for Plaintiffs

KAZEROONI LAW GROUP, APC

Dated: January , 2016

By:

Abbas Kazeroonian, Esq.
Attorneys for Plaintiffs

BERMAN DEVALERIO

Dated: January , 2016

By:

Todd Seaver
Attorneys for Plaintiffs

HYDE & SWIGART, APC

Dated: January , 2016

By:

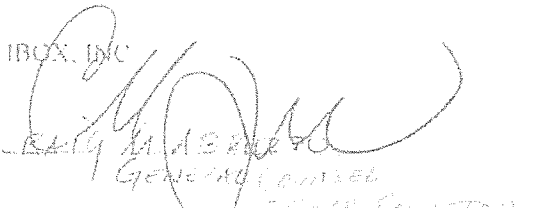
Joshua B. Swigart, Esq.
Attorney for Plaintiffs

BIRCHBOX, INC

Dated: January , 2016

By:

Title:


Emily M. Asker
General Counsel
"COMP. SECRETARY"

The Parties have agreed to the terms of this Agreement and have signed below.

Dated: January __, 2016

Tracy Davis

Dated: January __, 2016

Tiffany LaPuebla

HAMMONDLAW, P.C.

Dated: January __, 2016

By: _____
Julian Hammond, Esq.
Attorneys for Plaintiffs

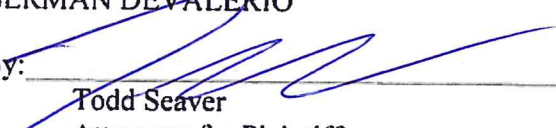
KAZEROUNI LAW GROUP, APC

Dated: January __, 2016

By: _____
Abbas Kazerounian, Esq.
Attorneys for Plaintiffs

BERMAN DEVALERIO

Dated: January __, 2016

By: _____

Todd Seaver
Attorneys for Plaintiffs

HYDE & SWIGART, APC

Dated: January __, 2016

By: _____
Joshua B. Swigart, Esq.
Attorney for Plaintiffs

BIRCHBOX, INC.

Dated: January __, 2016

By: _____
Title: _____

The Parties have agreed to the terms of this Agreement and have signed below.

Dated: January ___, 2016

Tracy Davis

Dated: January ___, 2016

Tiffany LaPuebla

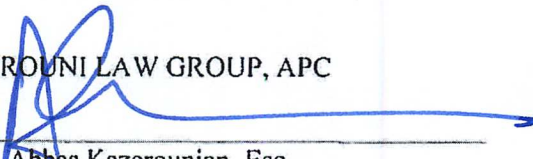
HAMMONDLAW, P.C.

Dated: January ___, 2016

By: _____
Julian Hammond, Esq.
Attorneys for Plaintiffs

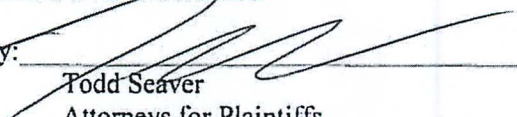
February
Dated: January 2, 2016

KAZEROONI LAW GROUP, APC

By:  _____
Abbas Kazerounian, Esq.
Attorneys for Plaintiffs

BERMAN DEVALERIO

Dated: January ___, 2016

By:  _____
Todd Seaver
Attorneys for Plaintiffs

HYDE & SWIGART, APC

Dated: January ___, 2016

By: _____
Joshua B. Swigart, Esq.
Attorney for Plaintiffs

BIRCHBOX, INC.

Dated: January ___, 2016

By: _____
Title: _____

The Parties have agreed to the terms of this Agreement and have signed below.

Dated: January __, 2016

Tracy Davis

Dated: January __, 2016

Tiffany LaPuebla

HAMMONDLAW, P.C.

Dated: January __, 2016

By: _____
Julian Hammond, Esq.
Attorneys for Plaintiffs

February
Dated: January 2, 2016

KAZEROUNI LAW GROUP, APC
By: _____
Abbas Kazerounian, Esq.
Attorneys for Plaintiffs

Dated: January __, 2016

BERMAN DEVALERIO
By: _____
Todd Seaver
Attorneys for Plaintiffs

Feb
Dated: January 2, 2016

HYDE & SWIGART, APC
By: _____
Joshua B. Swigart, Esq.
Attorney for Plaintiffs

BIRCHBOX, INC.

Dated: January __, 2016

By: _____
Title: _____

Exhibit A

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**TRACY DAVIS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,**

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

**TIFFANY LAPUEBLA,
INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY
SITUATED,**

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

Lead Case No.:

3:15-CV-00498-BEN-BGS

Case Consolidated with:

3:15-CV-00214-BEN-BGS

**THIS DOCUMENT RELATES TO: ALL
CASES**

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL**

Date:

Time:

Hon. Roger T. Benitez

On _____, this Court heard Plaintiffs Tracy Davis and Tiffany LaPuebla (“Plaintiffs”) unopposed motion for preliminary approval of class settlement and provisional class certification under Federal Rule of Civil Procedure 23. This Court reviewed the motion, including the Settlement Agreement and Release (“Agreement” or “Settlement”). Based on this review and the findings below, the Court found good cause to grant the motion.

FINDINGS:

Unless otherwise specified, defined terms in this Preliminary Approval and Provisional Class Certification Order have the same definition as the terms in the Agreement.

The Agreement falls within the range of possible approval as fair, reasonable and adequate.

The Long-Form Notice and E-Mail Notice constitute the best notice practicable under the circumstances and constitute valid, due, and sufficient notice to all members of the Class and they comply fully with the requirements of the Federal Rule of Civil Procedure, the California and United States Constitutions, and other applicable law; and

For settlement purposes only, the Class is so numerous that joinder of all Class Members is impracticable; Plaintiffs’ claims are typical of the Class’s claims; there are questions of law and fact common to the Class, which predominate over any questions affecting only individual Class Members; and Class certification is superior to other available methods for the fair and efficient adjudication of the controversy.

IT IS ORDERED THAT:

1. **Settlement Approval.** The Agreement, including the Long-Form Notice and E-Mail Notice attached to the Agreement as Exhibits B-C, is preliminarily approved.

2. **Provision of Class Notice.** Notice will be provided to Class Members of the Settlement in the manner specified under Section 3.3 of the Agreement and Defendant Birchbox, Inc. (“Birchbox”) will pay all costs associated with claims administration and providing notice to Class Members.

1 **3. Objection to Settlement.** Pursuant to Federal Rule of Civil Procedure
2 23(e)(5), members of the Settlement Class may object to the terms of the settlement.
3 Class Members who have not submitted a timely written exclusion request pursuant to
4 paragraph 6 below and who want to object to the Agreement must deliver written
5 objections to Class Counsel and Birchbox's Counsel no later than ninety (90) calendar
6 days from when the Court enters this Order. The delivery date is deemed to be the date
7 the objection is deposited in the U.S. Mail as evidenced by the postmark. Written
8 objections must include: (a) the name and case number of the Action, "*Davis v. Birchbox,*
9 *Inc.*, United States District Court, Southern District of California, Civil Action No. 3:14-
10 cv-00498-BEN-BGS"; (b) the full name, address, email address, and telephone number
11 of the person objecting; (c) the words "Notice of Objection" or "Formal Objection;" and
12 (d) in clear and concise terms, the legal and factual arguments supporting the objection,
13 including an attestation under the penalty of perjury of facts demonstrating that the
14 person objecting is a Class Member. The objection will not be valid if it only objects to
15 the Action's appropriateness or merits. Any Class Member that mails a written objection,
16 as described in this paragraph, has the option to appear at the Fairness Hearing, either in
17 person or through personal counsel hired at the Class Member's expense, to object to the
18 Settlement Agreement. However, Class Members or their attorneys intending to make an
19 appearance at the Fairness Hearing must make an indication of such intent in their
20 objection under a heading of "Notice of Intent to Appear." Only Class Members who
21 timely mail objections containing Notices of Intent to Appear may speak at the Fairness
22 Hearing.

23 **4. Failure to Object to Settlement.** Class Members who fail to object to the
24 Agreement in the manner specified above will: (1) be deemed to have waived their right
25 to object to the Agreement; (2) be foreclosed from objecting (whether by a subsequent
26 objection, intervention, appeal, or any other process) to the Agreement; and (3) not be
27 entitled to speak at the Fairness Hearing.
28

1 **5. Requesting Exclusion.** Class Members who want to be excluded from the
2 Settlement must send a letter or postcard to the Settlement Administrator stating: (a) the
3 name and case number of the Actions, "*Davis Birchbox, Inc.*, United States District
4 Court, Southern District of California, Civil Action No. 3:14-cv-00498-BEN-BGS"; (b)
5 the full name, address, email address, and telephone number of the person requesting
6 exclusion; and (c) a statement that he/she does not wish to participate in the Settlement,
7 postmarked no later than ninety (90) calendar days from when the Court enters this
8 Order.

9 **6. Provisional Certification.** The Class is provisionally certified for
10 settlement purposes only as a class of all persons in California who purchased a
11 subscription that automatically renewed from Birchbox between January 1, 2011 and
12 March 6, 2015.

13 **7. Appointment of Class Representative and Class Counsel.** Plaintiffs are
14 conditionally certified as the class representatives to implement the Parties' Settlement in
15 accordance with the Agreement. HammondLaw, P.C. and Kazerouni Law Group, APC
16 are appointed as Class Counsel. Plaintiffs and Class Counsel must fairly and adequately
17 protect the Class's interests.

18 **8. Termination.** If the Agreement terminates for any reason, the following
19 will occur: (a) Class certification will be automatically vacated; (b) Plaintiffs will stop
20 functioning as Class representatives; and (c) this Action will revert to its previous status
21 in all respects as it existed immediately before the Parties executed the Agreement. This
22 Order will not waive or otherwise impact the Parties' rights or arguments.

23 **9. No Admissions.** Nothing in this Order is, or may be construed as, an
24 admission or concession on any point of fact or law by or against any Party.

25 **10. Stay of Dates and Deadlines.** All proceedings in this action, including
26 discovery and pretrial proceedings and deadlines, are stayed and suspended until further
27 notice from the Court, except for such actions as are necessary to implement the
28 Agreement and this Order.

1 **11. Fairness Hearing.** On _____ 2016, at _____, this Court will
2 hold a Fairness Hearing to determine whether the Agreement should be finally approved
3 as fair, reasonable, and adequate. All papers supporting Plaintiff's request for attorneys'
4 fees and costs and for a service award must be filed no later than fourteen (14) calendar
5 days before the deadline for Class Members to object to the Settlement. All other papers
6 supporting final approval of the Agreement must be filed no later than seven (7) calendar
7 days before the Fairness Hearing. This Court may order the Fairness Hearing to be
8 postponed, adjourned, or continued. If that occurs, additional notice to Class Members
9 will not be required, but the Settlement administrator will update the Internet Posting
10 with the new hearing date and time.

11
12 **IT IS SO ORDERED.**

13
14 Dated: _____, 2016

15 By: _____

16 HON. ROGER T. BENITEZ
17 U.S. DISTRICT JUDGE
18
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Exhibit B

Tracy Davis v. Birchbox, Inc., Lead Case No. 3:15-CV-00498-BEN-BGS; Tiffany LaPuebla v. Birchbox, Inc., Case No. 3:15-CV-00214-BEN-BGS

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
CALIFORNIA

NOTICE OF CLASS ACTION AND PROPOSED SETTLEMENT

TO: All persons in California who purchased a Men's or Women's subscription that automatically renewed from Birchbox between January 1, 2011 and March 6, 2015.

IF YOU ARE A MEMBER OF THIS CLASS OF PERSONS, YOU SHOULD READ THIS NOTICE CAREFULLY BECAUSE IT WILL AFFECT YOUR LEGAL RIGHTS AND OBLIGATIONS.

A settlement ("Settlement") has been proposed in a class action lawsuit pending in the United States District Court, Southern District of California captioned *Davis v. Birchbox, Inc.*, Lead Case No. 3:14-cv-00498-BEN-BGS (the "Action"). Pursuant to the Settlement, each Class Member has the opportunity to receive two \$5 Birchbox credits to be used separately, equivalent to a total of \$10 for Class Members who purchased a Women's Subscription, and two \$10 Birchbox credits, equivalent to a total \$20 for Class Members who purchased a Men's Subscription. Credits will be issued to Class Members who do not exclude themselves from the Settlement (as described below) if the Settlement receives final approval from the Court.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT		
EXCLUDE YOURSELF	If you exclude yourself from the Settlement, you will not receive any payment under the Settlement. Excluding yourself is the only option that allows you to ever bring or maintain your own lawsuit against Birchbox regarding the allegations in the Action.	Deadline:
OBJECT	You may write to the parties' attorneys about why you object to (<i>i.e.</i> , do not like) the Settlement and think it should not be approved. Submitting an objection does not exclude you from the Settlement, so if you do not exclude yourself and if the Settlement receives final approval from the Court, you will still receive Birchbox credits and will forfeit the right to bring or maintain your own lawsuit against Birchbox.	Deadline:
GO TO THE "FAIRNESS HEARING"	The Court will hold a "Fairness Hearing" to consider the Settlement, the request for attorneys' fees and costs of the lawyers who brought the Action, and the Representative Plaintiff's request for a service award for bringing the Action. You (either you personally or through a lawyer you hire) may, but are not required to, speak at the Fairness Hearing about any Objection you submitted regarding the Settlement. If you intend to speak at the Fairness Hearing, you must indicate your intent to do so in your Objection.	Hearing Date:
DO NOTHING	You will give up your right to object to the Settlement and you will be not be able to be part of any other lawsuit about the legal claims	N/A

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT

	in this case. You will receive a payment under the Settlement.	
--	--	--

- These rights and options—and the deadlines to exercise them—are explained in more detail below.
- The Court in charge of the Action has preliminarily approved the Settlement and must decide whether to give final approval to the Settlement. The relief provided to Class Members will be provided only if the Court gives final approval to the Settlement and, if there are any appeals, after the appeals are resolved in favor of the Settlement. *Please be patient.*

BACKGROUND INFORMATION**1. What is this lawsuit about?**

Birchbox is a California-based online retailer that offers customers the opportunity to purchase cosmetics and other personal care products. Birchbox markets Men's and Women's Subscriptions that automatically renew for monthly deliveries of personal care products. Plaintiffs are former subscribers to Birchbox.

On May 14, 2015, Plaintiffs filed a consolidated complaint against Birchbox in the Southern District of California, San Diego, individually and on behalf of a California statewide putative class based on a claim that Birchbox violated the requirements of California Business and Professions Code sections 17600-17606 regarding disclosure, affirmative consent and acknowledgement of automatic renewal offer terms and cancellation rights in connection with a customer's purchase of Defendant's services, memberships, subscriptions and/or other products. Plaintiffs also assert related claims under California Business and Professions Code sections 17200 and 17535.

Birchbox denies plaintiffs' allegations, and contends that it only enrolls customers in its subscription plans with their consent.

The issuance of this Notice is NOT an expression of the Court's opinion on the merits or the lack of merits of any of the Plaintiff's claims in the Action. This Notice also is NOT indicative that Birchbox engaged in ANY wrongdoing.

For information about how to learn what has happened in the Action to date, please see Section 19 below.

2. Why is this a class action?

In a class action lawsuit, one or more people called "Representative Plaintiffs" (in this Action, the Representative Plaintiffs are Tiffany LaPuebla and Tracy Davis) sue on behalf of other people who may potentially have similar claims. For purposes of this proposed Settlement, one court will resolve the issues for all Class Members, except for those people who properly exclude themselves from the Class, as explained in Section 13 below. The company sued in this case, Birchbox, is called the "Defendant."

3. Why is there a Settlement?

The Representative Plaintiffs have made claims against Birchbox. **Birchbox denies that it has done anything wrong or violated any statute and admits no liability. The Court has NOT**

decided that either the Representative Plaintiffs or Birchbox should win this Action. Instead, both sides agreed to a Settlement. That way, they avoid the cost of a trial, and the Class Members will receive relief now rather than years from now, if at all.

4. *How do I know if I am part of the Settlement?*

The Court has decided that everyone who fits this description is a Class Member for purposes of the proposed Settlement: “All persons in California who purchased a subscription that automatically renewed from Birchbox between January 1, 2011 and March 6, 2015.”

5. *I’m still not sure if I am included.*

If you are still not sure whether you are included, you can call the Settlement Administrator at (888) xxx-xxx for more information or review all the Settlement documents found on the Settlement Website. The Settlement Administrator website is: settlement.com.

THE PROPOSED SETTLEMENT

6. *What relief does the Settlement provide to the Class Members?*

Pursuant to the Settlement, each Class Member will receive a Birchbox credit of \$10 for Class Members who purchased a Women’s Subscription, and \$20 for Class Members who purchased a Men’s Subscription. The credits will be provided in two equal amounts, to be used separately; specifically, two \$5 credits for Women’s Subscription Class Members and two \$10 credits for Men’s Subscription Class Members. These credits are good for the purchase of future products or subscriptions from Birchbox through the Birchbox.com website. These credits shall be one-use only (meaning that unused balances cannot be carried to future purchases) and are non-transferrable. Class Members will have one year from when the credits are first e-mailed within which to utilize the credit.

HOW TO RECEIVE PAYMENT

7. *How can I get a payment?*

If Birchbox’s computer records identify you as a Class Member, and you do not exclude yourself from the Settlement, the Settlement Administrator will automatically send you an e-mail regarding your credit. If the Court approves the Settlement, you do not need to do anything to receive your credit payment.

8. *When will I get the credit?*

The Court will hold a Final Approval Hearing on [], to decide whether to give final approval of the Settlement. Even if the Court gives final approval of the Settlement, there may be appeals. It is always uncertain when any appeals will be resolved, and resolving them can take time, perhaps more than a year. You can check on the progress of the case on the Settlement Website at www.settlement.com. Within twenty (20) days after the Final Settlement Date, the Settlement Administrator will automatically e-mail to you your credit amount. ***Please be patient.***

THE LAWYERS IN THIS CASE AND THE REPRESENTATIVE PLAINTIFF

9. *Do I have a lawyer in this case?*

The Court has ordered that HammondLaw, PC, Kazerouni Law Group, APC, Berman DeValerio, and Hyde & Swigart ("Class Counsel") will represent the interests of all Class Members. You will not be charged for these lawyers. If you want to be represented by your own lawyer, you may hire one at your own expense.

10. *How will the lawyers be paid?*

Class Counsel will request up to \$300,000 total for their attorneys' fees and costs. The Court will make the final decision as to the amounts to be paid to Class Counsel.

11. *Will the Representative Plaintiff receive any compensation for her efforts in bringing this Action?*

The Representative Plaintiffs will each request a service award (also known as an "incentive" award) of up to \$2,500 for their services as class representatives and efforts in bringing the Action. The Court will make the final decision as to the amount to be paid to the class representatives.

RELEASE OF ALL CLAIMS

12. *What am I giving up to obtain relief under the Settlement?*

If the Court approves the proposed Settlement, unless you exclude yourself from the Settlement as described in Section 13, you will be releasing your claims against Birchbox that are alleged in the Action. This generally means that you will not be able to file a lawsuit, continue prosecuting a lawsuit, or be part of any other lawsuit regarding the allegations in the Action. The Settlement Agreement, available on the Internet at the website www.settlement.com, contains the full terms of the release.

HOW TO EXCLUDE YOURSELF FROM THE SETTLEMENT

13. *How do I exclude myself from the Settlement?*

You may exclude yourself from the Class and the Settlement. If you want to be excluded, you must send a letter or postcard stating: (a) the name and case number of the Actions, "*Davis v. Birchbox, Inc.*, United States District Court, Southern District of California, Civil Action No. 3:14-cv-00498-BEN-BGS"; (b) your full name, address, email address, and telephone number; and (c) a statement that you do not wish to participate in the Settlement. This letter or postcard must be postmarked no later than May 20, 2016 and sent to the Settlement Administrator at:

Davis v. Birchbox, Inc.
Dahl Administration
c/o Settlement Administrator Address

If you timely request exclusion from the Class, you will be excluded from the Class, you will not be bound by the judgment entered in the Actions, and you will not be precluded from prosecuting any timely, individual claim against Birchbox based on the conduct complained of in the Actions. If you exclude yourself from the Settlement, then you may not object to the

Settlement.

HOW TO OBJECT TO THE SETTLEMENT

14. *How do I tell the Court that I do not like the Settlement?*

At the date, time, and location stated in Section 17 below, the Court will hold a Fairness Hearing to determine if the Settlement is fair, reasonable, and adequate, and to also consider Class Counsel's request for an award of attorneys' fees and costs, and service awards to the Representative Plaintiffs.

If you have not submitted a timely request for exclusion and wish to object to the fairness, reasonableness, or adequacy of the Settlement Agreement or the proposed Settlement, or to the award of attorneys' fees and costs or the service awards, you must mail a written objection to Class Counsel and Defendant's Counsel at the addresses set forth below no later than (*i.e.*, postmarked by) May 20, 2016.

CLASS COUNSEL	BIRCHBOX'S COUNSEL
Julian Hammond Ari Cherniak HAMMONDLAW, P.C. 1829 Reisterstown Rd. Suite 410 Baltimore, MD 21208 Telephone: (310) 601-6766 Facsimile: (310) 295-2385 jhammond@hammondlawpc.com acherniak@hammondlawpc.com	Gavin Rooney LOWENSTEIN SANDLER LLP 1251 Avenue of the Americas New York, NY 10020
Abbas Kazerounian Mona Amini KAZEROUNI LAW GROUP, APC 245 Fischer Avenue, Unit D1 Costa Mesa, CA 92626 Telephone: (800) 400-6808 Facsimile: (800) 520-5523 ak@kazlg.com mona@kazlg.com	

Any written objections must state: **(a)** the name and case number of the Actions: "*Davis v. Birchbox, Inc.*, United States District Court, Southern District of California, Civil Action No. 3:14-cv-00498-BEN-BGS"; **(b)** the full name, address, email address, and telephone number of the person objecting; **(c)** the words "Notice of Objection" or "Formal Objection;" and **(d)** in clear and concise terms, the legal and factual arguments supporting the objection, including an attestation, under the penalty of perjury, of facts demonstrating that the person objecting is a Class Member. You may, but need not, mail your objection through counsel of your choice. If you do make your objection through an attorney, you will be responsible for your personal attorney's fees and costs.

IF YOU DO NOT TIMELY MAKE YOUR OBJECTION, YOU WILL BE DEEMED TO HAVE WAIVED ALL OBJECTIONS AND WILL NOT BE ENTITLED TO SPEAK AT

THE FAIRNESS HEARING.

If you mail a written objection, you may appear at the Fairness Hearing, either in person or through personal counsel hired at your expense, to object to the Settlement Agreement. You are not required to appear if you do not want to. If you, or your attorney, intend to make an appearance at the Fairness Hearing, you must include in your objection a statement that you (or your lawyer) want to appear and speak under the heading of “Notice of Intent to Appear.”

15. *What is the difference between excluding myself and objecting to the Settlement?*

Objecting is simply telling the Court that you don’t like something about the Settlement. You can object only if you stay in the Class. Excluding yourself is telling the Court that you don’t want to be part of the Class. If you exclude yourself, you have no basis to object because the Settlement no longer affects you.

FAIRNESS HEARING

16. *What is the Fairness Hearing?*

The Court has preliminarily approved the Settlement and will hold a hearing, called the Fairness Hearing, to decide whether to give final approval to the Settlement. The purpose of the Fairness Hearing will be for the Court to determine whether the Settlement should be approved as fair, reasonable, adequate, and in the best interests of the Settlement Class; to consider the award of attorneys’ fees and expenses to Class Counsel; and to consider the request for service awards to the Representative Plaintiffs.

17. *When and where is the Fairness Hearing?*

On , 2016 at 9 a.m., a hearing will be held on the fairness of the proposed Settlement. At the hearing, the Court will be available to hear any objections and arguments concerning the proposed Settlement’s fairness from Class Members who timely submitted written objections and Notices of Intent to Appear. The hearing will take place before the Honorable Roger T. Benitez of the United States District Court, Southern District of California, located at Courtroom 5A (5th Floor - Schwartz), Suite 5135, 221 West Broadway, San Diego, CA, 92101.

The hearing may be postponed to a different date or time or location without notice. Please check www.settlement.com for any updates about the Settlement generally or the Fairness Hearing specifically. If the date or time of the Fairness Hearing changes, an update to the Settlement website will be the only way you will be informed of the change.

18. *May I speak at the hearing?*

At the Fairness Hearing, the Court will be available to hear any objections and arguments concerning the fairness of the Settlement from Class Members who timely submitted written objections and Notices of Intent to Appear.

You may attend, but you do not have to. As described above in Section 14, you may speak at the Fairness Hearing only if you have timely mailed an objection, and included in your timely objection a statement that you (or your attorney) intend to appear and speak at the Fairness Hearing under the heading of “Notice of Intent to Appear”.

If you have requested exclusion from the Settlement, however, you may not speak at the Fairness Hearing.

GETTING MORE INFORMATION

19. *How do I get more information?*

To see a copy of the Settlement Agreement, the Court's Preliminary Approval Order, Class Counsel's application for attorneys' fees and costs, and the operative complaint filed in the Action, please visit the Settlement website located at: www.settlement.com. Alternatively, you may contact the Settlement Administrator. The address of the Settlement Administrator is: *Davis v. Birchbox, Inc.*, Settlement Administrator, c/o Settlement Address.

This description of the Action is general and does not cover all of the issues and proceedings that have occurred. You may also inspect the Court files at the Clerk of the Court, United States District Court Judge, Southern District, Courtroom 5A (5th Floor - Schwartz), Suite 5135, 221 West Broadway, San Diego, CA, from 10:00 a.m. to 4:00 p.m., Monday through Friday. The Clerk will tell you how to obtain the file for inspection and copying at your own expense. If you have questions about the settlement, you may also contact Class Counsel.

20. *What if my address or other information has changed or changes after I Receive this Notice?*

It is your responsibility to inform the Settlement Administrator of your updated information. You may do so at the address below:

Davis v. Birchbox, Inc.
Dahl Administration
c/o Settlement Administrator Address

**DO NOT ADDRESS ANY QUESTIONS ABOUT THE SETTLEMENT OR THE
LITIGATION TO THE CLERK OF THE COURT OR THE JUDGE.**

Exhibit C

To: <<Class Member Email Address>>
From: Settlement Administrator
Subject: LEGAL NOTICE OF SETTLEMENT OF CLASS ACTION

NOTICE OF PENDING CLASS ACTION AND NOTICE OF PROPOSED SETTLEMENT

You are receiving this e-mail because you may have purchased a subscription that automatically renewed from Birchbox between January 1, 2011 and March 6, 2015.

A Federal District Court authorized this Notice. This is not a solicitation from a lawyer.

Why did I get this notice? A settlement (“Settlement”) has been proposed in a class action lawsuit pending in the United States District Court, Southern District of California (“Court”) titled *Davis v. Birchbox, Inc.*, Lead Case No. 3:14-cv-00498-BEN-BGS (“Action”). According to available records, you may be a “Settlement Class Member.” The purpose of this notice is to inform you of the Action and the Settlement so that you may decide what steps to take in relation to it.

What is the Action about? Birchbox is an online retailer that offers customers the opportunity to purchase cosmetics and other personal care products. Plaintiffs Tracy Davis and Tiffany LaPuebla bring the lawsuit individually and on behalf of a California statewide putative class based on a claim that Birchbox violated the requirements of California Business and Professions Code sections 17600-17606 regarding disclosure, affirmative consent and acknowledgement of automatic renewal offer terms and cancellation rights in connection with a customer’s purchase of Defendant’s services, memberships, subscriptions and/or other products. Plaintiffs also assert related claims under California Business and Professions Code sections 17200 and 17535. Birchbox denies these allegations, and contends that it only enrolls customers in its subscription plans with their consent.

Birchbox denies any wrongdoing and any liability whatsoever, and no court or other entity has made any judgment or other determination of any liability.

What relief does the Settlement provide? Pursuant to the Settlement, each Settlement Class Member who purchased a Woman’s Subscription will receive two \$5 Birchbox credits, for a total credit of \$10, and each Settlement Class Member who purchased a Men’s Subscription will receive two \$10 credits, for a total credit of \$20. The credits will be issued to Class Members who do not opt out (as described below) if the Settlement receives final approval from the Court. The Settlement website at www.settlement.com contains a complete description of the proposed Settlement.

Court Approval of the Settlement/When the Credit Will Be Sent: The Court will hold a “Fairness Hearing” on _____, at 9:00 a.m. to consider whether to approve the Settlement, a request by the lawyers who filed the lawsuits for up to \$300,000 in fees and costs, and the Plaintiffs’ request for an incentive award of \$2,500 each for their services. The Credit will only be sent if the Settlement is approved. Please be patient.

Other Options: If you are a Settlement Class Member and don't want to be legally bound by the Settlement, you must exclude yourself by _____. If you stay in the Settlement, you may object to it (*i.e.*, state the reasons you do not like it) by _____. The detailed notice explains how to exclude yourself or object. If you object, you may ask to appear at the Fairness Hearing, but you don't have to.

More information? For complete information about the Settlement, including the Settlement Agreement, certain court documents, and the detailed notice and to learn more about how to exercise your various options under the Settlement, visit www.settlement.com. You may also write to the Settlement Administrator at *Davis v. Birchbox, Inc.*, Settlement Administrator, c/o Address, or via email at admin@settlement.com.

Exhibit D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TRACY DAVIS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

TIFFANY LAPUEBLA,
INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY
SITUATED,

Plaintiff,

v.

BIRCHBOX, INC.,

Defendant.

Lead Case No.:

3:15-CV-00498-BEN-BGS

Case Consolidated with:

3:15-CV-00214-BEN-BGS

THIS DOCUMENT RELATES TO: ALL
CASES

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR FINAL
APPROVAL**

Date:

Time:

Hon. Roger T. Benitez

1 On _____, 2016, this Court heard Plaintiffs Tracy Davis and Tiffany
2 LaPuebla ("Plaintiffs") unopposed motion for final approval of the class action
3 settlement. This Court reviewed: (a) the motion and the supporting papers, including the
4 Settlement Agreement and Release ("Agreement" or "Settlement"); (b) all objections
5 filed with or presented to the Court; (c) the Parties' responses to any objections; and (d)
6 counsels' arguments. Based on this review and the findings below, the Court found good
7 cause to grant the motion.

8 **FINDINGS:**

9 1. Unless otherwise specified, defined terms in this Final Order and Judgment
10 have the same definition as the terms in the Agreement.

11 2. The Settlement was entered into in good faith, is fair, reasonable and
12 adequate, and satisfies the standards and applicable requirements for final approval of
13 this class action settlement pursuant to Rule 23(e)(1)(A) of the Federal Rules of Civil
14 Procedure.

15 3. The Parties adequately performed their obligations under the Agreement.

16 4. Notice was provided to Class Members in compliance with Section 3.3 of
17 the Agreement, Federal Rules of Civil Procedure Rule 23(e)(1)(B), the United States
18 Constitution, and any other applicable law. The notice: (i) fully and accurately informed
19 Class Members about the lawsuit and Settlement; (ii) provided sufficient information so
20 that Class Members were able to decide whether to accept the benefits offered, opt out
21 and pursue their own remedies, or object to the proposed Settlement; (iii) provided
22 procedures for Class Members to file written objections to the proposed Settlement, to
23 appear at the hearing, and to state objections to the proposed Settlement; and (iv)
24 provided the time, date and place of the final fairness hearing.

25 5. An award of \$ _____ in attorneys' fees and costs to Class
26 Counsel is fair and reasonable in light of the nature of this case, Class Counsel's
27 experience and efforts in prosecuting this Action, and the benefits obtained for the Class.
28

6. An incentive award to each Plaintiff of \$_____ is fair and reasonable in light of: (a) Plaintiffs' risks (including financial, professional, and emotional) in commencing this action as the class representative; (b) the time and effort spent by Plaintiffs spent in litigating this action as the class representative; and (c) Plaintiffs' public interest service.

IT IS ORDERED THAT:

1. **Class Members.** For Settlement purposes, the Class Members are defined as:

All all persons in California who purchased a subscription that automatically renewed from Birchbox, Inc. ("Birchbox") between January 1, 2011 and March 6, 2015.

2. **Binding Effect of Order.** This order applies to all claims or causes of action settled under the Agreement, and binds all class members, including those who did not properly request exclusion under paragraph 6 of the Preliminary Approval and Provisional Class Certification Order. This order does not bind persons who filed timely and valid requests for exclusion. Attached to this Order as **Exhibit A** is a list of persons who properly requested to be excluded from the Settlement.

3. **Release.** Plaintiffs and all Class Members who did not properly request exclusion are: (1) deemed to have released and discharged Birchbox from all claims arising out of or asserted in this Action and claims released under the Agreement; and (2) barred and permanently enjoined from asserting, instituting, or prosecuting, either directly or indirectly, these claims. The full terms of the release described in this paragraph are set forth in paragraphs 4.2 and 4.3 of the Agreement.

4. **Class Relief.** Birchbox, through the Settlement Administrator, will issue two \$5 credits, to be used separately, equivalent to a total credit of \$10 to each Class Member who subscribed to the Women's Subscription and two \$10 credits, to be used separately, equivalent to a total credit of \$20 to each Class Member who subscribed to

1 the Men's Subscription, to each pursuant to the terms and timeline set forth in Section 2.1
2 of the Agreement.

3 **5. Attorney's Fees and Costs.** Class Counsel is awarded
4 \$_____ in fees and costs. Birchbox must pay Class Counsel this
5 amount according to the timeline set forth in Section 2.3 of the Agreement.

6 **6. Incentive Award.** Plaintiffs are each awarded \$_____ as
7 an incentive award. Birchbox must pay Plaintiffs this amount according to the timeline
8 set forth in Section 2.4 of the Agreement.

9 **7. Court's Jurisdiction.** This action is hereby dismissed with prejudice;
10 provided, however, that without affecting the finality of this Order, the Court retains
11 exclusive and continuing jurisdiction over the case for purposes of supervising,
12 implementing, interpreting and enforcing this Order and the Settlement Agreement, as
13 may become necessary, until all of the terms of the Settlement Agreement have been
14 fully carried out. Plaintiffs' counsel shall notify the Court when this has occurred.



15
16 **IT IS SO ORDERED.**

17
18 Dated:_____, 2016

19 By: _____

20 HON. ROGER T. BENITEZ
21 U.S. DISTRICT JUDGE
22
23
24
25
26
27
28

Exhibit E

	Quantity	Price	Total
 Your 1st Birchbox - Monthly rebillable subscription Shipping: February 01, 2016 Remove			
At the start of each monthly billing cycle, your payment method will be automatically charged at the current rate until you cancel. You may cancel at any time by calling (877) 487-7272 or visiting your account page at https://www.birchbox.com/shop/customer/account/ .	1	\$10.00	\$10.00
 Your 1st Birchbox - Yearly rebillable subscription - 1 month free! Shipping: February 01, 2016 Remove			
At the end of each yearly subscription term, your payment method will be automatically charged each year at the then current rate until you cancel. You may opt out of auto-renewal by calling (877) 487-7272 or sending us a message at http://info.birchbox.com any time before subscription renewal occurs.	1	\$110.00	\$110.00

Davis v. Birchbox, Inc.

United States District Court, Southern District of California

Case No.: 3:15-cv-00498-BEN-BGS

CERTIFICATE OF SERVICE

I, Eva Dickey, declare as follows:

I am over the age of eighteen years and not a party to the case. I am employed in the County of San Diego, California where the mailing occurs: My business address is 2221 Camino Del Rio South, Suite 101, San Diego, CA 92108.

On the date below I electronically filed with the Court through its CM/ECF program and served through the same program the following document(s):

- **Notice of Motion and Unopposed Motion for Order Granting Preliminary Approval of Class Action Settlement**
- **Memorandum of Points and Authorities in Support of Plaintiffs' Unopposed Motion for Order Granting Preliminary Approval of Class Action Settlement**
- **Declaration of Abbas Kazerounian in Support of Plaintiffs' Unopposed Motion for Order Granting Preliminary Approval of Class Action Settlement**
- **Declaration of Julian Hammond in Support of Plaintiffs' Unopposed Motion for Order Granting Preliminary Approval of Class Action Settlement**
- **Appendix of Exhibits to the Declaration of Julian Hammond**
- **Plaintiff's Exhibit 1**
- **Plaintiff's Exhibit 2**

On the interested parties in said case addressed as follows:

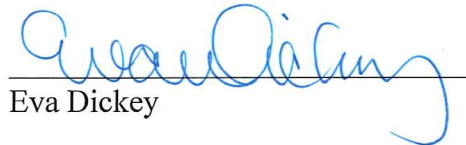
Gavin Rooney
Lowenstein Sandler
1251 Avenue of the Americas
New York, NY 10020

Jewel Watson
Lowenstein Sandler LLP
65 Livingston Avenue
Roseland, NJ 07068

Michael J. McGaughey
Lowenstein Sandler LLP
445 S. Figueroa Street, Suite 3177
Los Angeles, CA 90071

[X] ELECTRONICALLY, Pursuant to the CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

I declare under penalty under perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 2, 2016, at San Diego, California.


Eva Dickey

HYDE & SWIGART
San Diego, California