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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY ELDER, individually and on behalf of all others similarly situated,

Plaintiff,

v.

HILTON WORLDWIDE HOLDINGS, INC. and HILTON GRAND VACATIONS COMPANY, INC., PREMIER GETAWAY, INC., and BLACKHAWK ENGAGEMENT SOLUTIONS, INC.

Defendants.

Case No. 3:16-cv-00278 TEH

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: July 31, 2017
Time: 10:00 a.m.
Courtroom 2, 17th Floor

Judge Thelton E. Henderson

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on July 31, 2017 at 10:00 a.m., or as soon thereafter as the matter may be heard by the above-captioned Court, located at 450 Golden Gate Avenue, Courtroom 2, 17th Floor, San Francisco, California 94102, in the courtroom of the Honorable Thelton E. Henderson, Plaintiff Timothy Elder will and hereby does move, pursuant to Fed. R. Civ. P. 23(e), for the Court to: (i) grant preliminary approval of the proposed Stipulation for Class Action Settlement ("Settlement Agreement"), (ii) provisionally certify the Settlement Class[1] for the purposes of preliminary approval, designate Plaintiff Elder as the Class Representative, and appoint Bursor & Fisher, P.A. and the Law Offices of Jana Eisinger, PLLC as Class Counsel for the Settlement Class, (iii) establish procedures for giving notice to the Settlement Class Members, (iv) approve forms of notice to Settlement Class Members, (v) mandate procedures and deadlines for exclusion requests and objections, and (vi) set a date, time, and place for a final approval hearing.

This motion is made on the grounds that preliminary approval of the proposed class action settlement is proper, given that each requirement of Rule 23(e) has been met.

This motion is based on the attached Memorandum of Points and Authorities, the accompanying Joint Declaration of L. Timothy Fisher and Jana Eisinger, the pleadings and papers on file herein, and any other written and oral arguments that may be presented to the Court.

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

Whether the Court should preliminarily approve the proposed class action settlement pursuant to Fed. R. Civ. P. 23(e).

[1] All capitalized terms herein that are not otherwise defined have the definitions set forth in the Settlement Agreement, filed concurrently herewith. *See* Ex. 1 to the Declaration of L. Timothy Fisher (the "Fisher Decl.") submitted herewith.

Dated: June 16, 2017

Respectfully Submitted,

BURSOR & FISHER, P.A.

By: /s/ L. Timothy Fisher
L. Timothy Fisher

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H. Newberg & Conte, 1 Newberg on Class Actions (1992). 5, 11

I. INTRODUCTION

Plaintiff Timothy Elder ("Plaintiff"), by and through his counsel, respectfully submits this memorandum of law in support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

In this case, Plaintiff contended that Defendants Hilton Worldwide Holdings, Inc. and Hilton Grand Vacations Company, Inc. ("Hilton") sought to entice their customers to participate in timeshare presentations by offering them a $100 or $200 certificate for a deeply-discounted stay at a Hilton hotel. The certificates are referred to as "Spend A Night On Us" or "SANU" certificates. Plaintiff alleges that Hilton refuses to honor the SANU certificates when the certificates are used for a stay at anything other than a Hilton hotel. Thus, Hilton would reject the SANU certificate submitted by a person who stayed at the Hilton Garden Inn or DoubleTree by Hilton even though those hotels are owned and operated by Hilton.

After more than a year of litigation, the parties have reached a settlement (the "Settlement"). The Settlement Agreement states Hilton will provide Settlement Class Members with a new SANU certificate valid for a rebate of up to $50 (if the Class Member previously received a $100 SANU certificate) or up to $100 (if the Class Member previously received a $200 SANU certificate) on a stay at any of the following Hilton brand properties: (1) Hilton Hotel; (2) DoubleTree by Hilton; (3) Embassy Suites by Hilton; (4) Hilton Garden Inn; (5) Hampton Inn; or (6) Homewood Suites by Hilton. *See* Settlement Agreement ¶ 15, Ex. 1 to the Fisher Decl. The new SANU certificate will be valid for use and redemption for two years of the date of issuance. *Id.* The Settlement Agreement defines the Settlement Class to include:

> All persons in the United States who received a "Spend a Night on Us" ("SANU") certificate from Hilton that stated it was for use at "any Hilton Hotel," and that Hilton refused to honor, based solely on the brand of Hilton hotel that the certificate holder had stayed at, during the period from January 15, 2012 through February 28, 2014.

Id. ¶ 14.

The benefits of the Settlement will be distributed automatically once the Court approves the Settlement. This is an excellent result for the more than 10,000 Settlement Class Members,

compared to their likely recovery should they prevail at trial. That is, the settlement provides 50 percent of the maximum recovery they could have hoped to achieve had the case proceeded to trial. Importantly, Settlement Class Members will not need to do anything to receive the new SANU certificates. They will be sent directly to all Settlement Class Members once the Settlement becomes final.

Prior to the filing of the initial Complaint, Hilton changed the language on the face of its SANU certificates to specifically identify the Hilton brand hotels that were excluded from the rebate. Amended Complaint ¶ 31. This Settlement is intended to compensate Class Members whose certificates were rejected prior to Hilton's institution of this change.

In addition to the consideration set forth above, Hilton has also agreed to pay all costs of notice and claims administration, which includes service by email or U.S. mail to each Class member, and establishment of a detailed settlement website that will provide information to Settlement Class Members. Settlement Agreement ¶ 34. Subject to this Court's approval, the parties have agreed to the selection of Dahl Administration LLC as the Settlement Administrator and Notice Provider.

In addition, Class Counsel will ask the Court to approve an incentive award of $5,000.00 to be paid to Plaintiff Elder. Hilton has agreed not to oppose Class Counsel's request that Hilton pay this incentive award. Settlement Agreement ¶ 17. Plaintiff Elder shall also receive the same settlement consideration as the remaining Class Members. *Id.* ¶ 43. Finally, Hilton has agreed that Plaintiff's counsel may petition the Court for approval of their reasonable attorney's fees and costs, which, if approved, Hilton shall pay up to an agreed-upon cap of $310,000. *Id.* ¶ 41.

As in any class action, the proposed Settlement is initially subject to preliminary approval and then to final approval by the Court after notice to the Settlement Class Members and a hearing. Plaintiff now requests that this Court enter an order in the form of the accompanying [Proposed] Order Preliminarily Approving Class Action Settlement, which will:

(1) Grant preliminary approval of the proposed Settlement;

(2) Provisionally certify the Settlement Class on a nationwide basis for the purposes of preliminary approval, designate Plaintiff

Timothy Elder as the Class Representative, and Bursor & Fisher, P.A. and the Law Offices of Jana Eisinger, PLLC as Class Counsel for the Settlement Class;

(3) Establish procedures for giving notice to the Settlement Class Members;

(4) Approve forms of notice to Settlement Class Members;

(5) Mandate procedures and deadlines for exclusion requests and objections; and

(6) Set a date, time and place for a final approval hearing.

The proposed Settlement is fair and reasonable and falls within the range of possible approval. It is the product of extended arm's-length negotiations between experienced attorneys familiar with the legal and factual issues of this case. Class Counsel has conducted an extensive investigation into the facts and law relating to this matter and has taken a significant amount of written discovery as well as depositions of key Hilton witnesses.

As a result of these efforts, Class Counsel is fully informed of the merits of the instant action and the proposed settlement, has substantial experience in consumer litigation and has, as a result, been efficient in substantially streamlining the fact gathering process so as to reach the proposed settlement promptly and without protracted litigation.

The proposed Settlement Class meets every element of Rule 23(a) and (b)(3). The Settlement Class is so numerous that the joinder of all members is impracticable; there are questions of law or fact common to the proposed Settlement Class; Plaintiff Elder's claims are typical of those of the Settlement Class; and Plaintiff Elder will fairly and adequately protect the interests of the proposed Settlement Class. In addition, common issues of law and fact predominate over any questions affecting only individual class members, and a class action as proposed here is superior to other available methods for the fair and efficient adjudication of the controversy. The Court should grant preliminary approval to the Settlement.

II. PROCEDURAL BACKGROUND

A. The Complaint

On January 15, 2016, Plaintiff Elder filed his Class Action Complaint. Dkt. No. 1. The

complaint alleged that Hilton refused to honor its $100 and $200 SANU certificates when a customer stayed at a Hilton brand hotel such as the Hilton Garden Inn, Embassy Suites or the DoubleTree by Hilton instead of a "Hilton" hotel (*e.g.* the Hilton San Francisco Union Square). Plaintiff asserted claims for breach of express warranty, breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, breach of contract, unjust enrichment, violation of the California Consumers Legal Remedies Act ("CLRA"), violation of the California Unfair Competition Law ("UCL"), violation of the California False Advertising Law ("FAL"), negligent misrepresentation, and fraud. Dkt. No. 1 ¶¶ 39-109. On March 22, 2017, Plaintiff filed an Amended Complaint, adding Blackhawk Engagement Solutions, Inc. and Premier Getaways, Inc. as Defendants, and adding claims for Aiding and Abetting and Civil Conspiracy against all Defendants. Dkt. No. 55.

B. Discovery

After Hilton answered the complaint, Plaintiff served comprehensive document requests and interrogatories. Fisher Decl. ¶¶ 13-14. Hilton produced nearly 2,500 pages of documents in response to Plaintiff's document requests as well as thousands of audio recordings of customer calls to Hilton. *Id.* ¶ 13. Plaintiff also took the depositions of two key Hilton witnesses: Christian Hayes and Michael Murphy. *Id.* ¶ 16. Mr. Hayes and Mr. Murphy were significantly involved with the creation and implementation of the SANU certificate program. *Id.* Plaintiff also took the 30(b)(6) deposition of Hilton. *Id.* Mr. Murphy was designated as Hilton's person most knowledge on the topics set forth in Plaintiff's deposition notice. *Id.* The discovery in the case was highly contentious and involved numerous hours of meeting and conferring regarding the scope of Plaintiff's requests and the documents Hilton would produce in response. *Id.* ¶ 15.

C. Settlement

Shortly after the case was filed, the parties began to informally discuss the possibility of settlement. *Id.* ¶ 17. The settlement discussions continued at an all-day mediation on October 19, 2016 with John A. Koeppel, Esq. of Roper Majeski. *Id.* That mediation did not result in a settlement. *Id.* The parties continued to speak informally for the next six months. *Id.* The

negotiations were contentious and fell apart on numerous occasions. *Id.* Nevertheless, counsel for Plaintiff and Hilton are experienced and continued to work through their differences in hopes of reaching an agreement. *Id.* An agreement was finally reached on May 4, 2016 when the parties executed a settlement term sheet. *Id.* The Settlement Agreement was signed on June 16, 2017. *Id.*

III. THE LEGAL STANDARD FOR PRELIMINARY APPROVAL

Approval of class action settlements involves a two-step process. First, the Court must make a preliminary determination whether the proposed settlement appears to be fair and is "within the range of possible approval." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 273 (N.D. Cal. 1976). If so, notice can be sent to Settlement Class Members and the Court can schedule a final approval hearing where a more in-depth review of the settlement terms will take place. *See Manual for Complex Litigation, 3d Edition*, § 30.41 at 236-38 (hereafter, the "Manual").

The purpose of preliminary approval is for the Court to determine whether the parties should notify the putative class members of the proposed settlement and proceed with a fairness hearing. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079. Notice of a settlement should be disseminated where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Id.* (*quoting* NEWBERG ON CLASS ACTIONS § 11.25 (1992)). Preliminary approval does not require an answer to the ultimate question of whether the proposed settlement is fair and adequate, for that determination occurs only after notice of the settlement has been given to the members of the settlement class. *See Dunk v. Ford Motor Company*, 48 Cal. App. 4th 1794, 1801 (1996).

Nevertheless, a review of the standards applied in determining whether a settlement should be given *final* approval is helpful to the determination of preliminary approval. One such standard is the strong judicial policy of encouraging compromises, particularly in class actions. *See In re*

1 *Syncor*, 516 F.3d at 1101 (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir.
2 1982), *cert. denied*, 459 U.S. 1217 (1983)).
3 While the district court has discretion regarding the approval of a proposed settlement, it
4 should give "proper deference to the private consensual decision of the parties." *Hanlon v. Chrysler*
5 *Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). In fact, when a settlement is negotiated at arm's-length
6 by experienced counsel, there is a presumption that it is fair and reasonable. *See In re Pac. Enters.*
7 *Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Ultimately, however, the Court's role is to ensure that
8 the settlement is fundamentally fair, reasonable, and adequate. *See In re Syncor* 516 F.3d at 1100.
9 Beyond the public policy favoring settlements, the principal consideration in evaluating the
10 fairness and adequacy of a proposed settlement is the likelihood of recovery balanced against the
11 benefits of settlement. "[B]asic to this process in every instance, of course, is the need to compare
12 the terms of the compromise with the likely rewards of litigation." *Protective Committee for*
13 *Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968).
14 That said, "the court's intrusion upon what is otherwise a private consensual agreement negotiated
15 between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment
16 that the agreement is not the product of fraud or overreaching by, or collusion between, the
17 negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all
18 concerned." *Officers for Justice*, 688 F.2d at 625.
19 In preliminarily evaluating the adequacy of a proposed settlement, particular attention should
20 be paid to the process of settlement negotiations. Here, the negotiations were conducted by
21 experienced class action counsel. Thus, counsel's assessment and judgment are entitled to a
22 presumption of reasonableness, and the Court is entitled to rely heavily upon their opinion. *Boyd v.*
23 *Bechtel Corp.*, 485 F. Supp. 610, 622-23 (N.D. Cal. 1979).
24 **IV. THE SETTLEMENT AGREEMENT IS FAIR, ADEQUATE, AND REASONABLE**
25 Rule 23(e)(2) provides that "the court may approve [a proposed class action settlement] only
26 after a hearing and on finding that it is fair, reasonable, and adequate." When making this
27 determination, the Ninth Circuit has instructed district courts to balance several factors: (1) the
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strength of plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; and (6) the experience and views of counsel. *Hanlon*, 150 F.3d at 1026;[2] *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Here, the balance of these factors readily establishes that the proposed settlement should be preliminarily approved.

A. Strength of Plaintiff's Case

In determining the likelihood of a plaintiff's success on the merits of a class action, "the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (internal quotations omitted). The court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm. Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010) (citing *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

Here, Class Counsel engaged in lengthy arm's-length negotiations with Hilton's counsel, and were thoroughly familiar with the applicable facts, legal theories, and defenses. *See* Fisher Decl. ¶¶ 13-19. Although Plaintiff and his counsel believe that Plaintiff's claims have merit, they also recognize that they will face significant risks at class certification, summary judgment, and trial. *Id.* ¶ 18. Indeed, Hilton intended to argue that a class could not be certified because of the individualized nature of the proposed class members' interactions with Hilton. *Id.* Hilton also intended to argue that the supposedly limited nature of the SANU certificates was disclosed to each class member and that many class members' claims were barred from being adjudicated in this forum and on a class-wide basis by a class action waiver provision. *Id.* Similarly, Hilton would no doubt present a vigorous defense at trial, and there is no assurance that the Class would prevail. *Id.* Thus, in the eyes of Class Counsel, the proposed Settlement provides the Settlement Class with an

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[2] In *Hanlon*, the Ninth Circuit also instructed district courts to consider "the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026. This consideration is more germane to final approval, and will be addressed at the appropriate time.

outstanding opportunity to obtain significant relief at this early stage in the litigation. *Id.* ¶¶ 18-19. The Settlement Agreement also abrogates the risks that might prevent them from obtaining relief. *Id.* ¶ 18.

B. Risk of Continuing Litigation

As referenced above, proceeding in this litigation in the absence of settlement poses various risks such as failing to certify a class, having summary judgment granted against Plaintiff, or losing at trial. Such considerations have been found to weigh heavily in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class."). Even assuming that Plaintiff were to survive summary judgment, he would face the risk of establishing liability at trial. Fisher Decl. ¶ 18. The outcome of the case hinged on the interpretation of language on the face of the SANU certificate. *Id.* There was simply no guarantee that the jury would see things Plaintiff's way. *Id.* The experience of Class Counsel has taught them that these considerations can make the ultimate outcome of a trial highly uncertain. *Id.*

Moreover, even if Plaintiff were to prevail at trial, the Class would face additional risks if Hilton appealed or moved for a new trial. For example, in *In re Apple Computer Sec. Litig.*, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991), the jury rendered a verdict for the plaintiffs after an extended trial. Based on the jury's findings, recoverable damages would have exceeded $100 million. However, weeks later, the trial judge overturned the verdict, entering judgment notwithstanding the verdict for the individual defendants, and ordered a new trial with respect to the corporate defendant. By settling, Plaintiff and the Settlement Class avoid these risks, as well as the delays and risks of the appellate process.

C. Risk of Maintaining Class Action Status

In addition to the risks of continuing the litigation, Plaintiff would also face risks in certifying a class and maintaining that class status through trial. Even assuming that the Court were to grant a motion for class certification, the class could still be decertified at any time. *See In re*

Netflix Privacy Litig., 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement.") (internal citations omitted). From their prior experience, Class Counsel anticipate that Hilton would likely move for reconsideration, attempt to appeal the Court's decision pursuant to Rule 23(f), and/or move for decertification at a later date. Here, the Settlement Agreement eliminates these risks by ensuring Settlement Class Members a recovery that is "certain and immediate, eliminating the risk that class members would be left without any recovery … at all." *Fulford v. Logitech, Inc.*, 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010).

D. The Extent of Discovery and Status of Proceedings

Under this factor, courts evaluate whether class counsel had sufficient information to make an informed decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Here, Plaintiff has taken significant written and deposition discovery. *See* Fisher Decl. ¶¶ 13-16. Specifically, Plaintiff has served written discovery, reviewed thousands of pages of documents and taken depositions of critical defense witnesses. *Id.* In addition, Class Counsel has engaged in extensive discussions regarding the case with Hilton's counsel as part of their meet and confer sessions regarding discovery and during the lengthy settlement negotiations. *Id.* ¶¶ 15, 17. Hilton also agreed to work cooperatively with Class Counsel and the Settlement Administrator to provide additional data as may be required in support of the Settlement and to facilitate provision of direct notice to the Settlement Class. *See* Settlement Agreement ¶ 21.

E. Experience and Views of Counsel

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). Deference to Class Counsel's evaluation of the Settlement is appropriate because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967 (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

Here, the Settlement was negotiated by counsel with extensive experience in consumer class action litigation. *See* Ex. 5 to the Fisher Decl. and Ex. 1 to the Eisinger Decl. (firm resumes of Bursor & Fisher, P.A. and the Law Office of Jana Eisinger, PLLC). Based on their collective experience, Class Counsel concluded that the Settlement Agreement provides exceptional results for the Settlement Class while sparing Settlement Class Members from the uncertainties of continued and protracted litigation.

V. THE COURT SHOULD PROVISIONALLY CERTIFY THE SETTLEMENT CLASS FOR THE PURPOSES OF PRELIMINARY APPROVAL

The Ninth Circuit has recognized that certifying a settlement class to resolve consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. When presented with a proposed settlement, a court must first determine whether the proposed settlement class satisfies the requirements for class certification under Rule 23. In assessing those class certification requirements, a court may properly consider that there will be no trial. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial.")

The Settlement Class consists of "All persons in the United States who received a "Spend a Night on Us" certificate from Hilton that stated it was for use at "any Hilton Hotel," and that Hilton refused to honor, based solely on the brand of Hilton hotel that the certificate holder had stayed at, during the period from January 15, 2012 through February 28, 2014." Excluded from this definition are (a) Hilton and all of Hilton's past and present respective parents, subsidiaries, divisions, affiliates, persons and entities directly or indirectly under its or their control in the past or in the present, (b) Hilton's respective assignors, predecessors, successors, and assigns, (c) all past or present partners, shareholders, managers, members, directors, officers, employees, agents, attorneys, insurers, accountants, and representatives of any and all of the foregoing, and (d) all persons who file a timely Request for Exclusion from the Settlement Class. This Court has not yet certified this case as a class action. For the reasons below, the Class meets the requirements of Rule 23(a) and (b). For

settlement purposes, the parties and their counsel request that this Court provisionally certify the Settlement Class.

A. The Class Satisfies Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." *See* Fed. R. Civ. P. 23(a)(1). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members, but not satisfied when membership dips below 21." *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000). Here, the proposed Settlement Class is comprised of more than 10,000 people whose SANU certificates were rejected by Hilton – a number that obviously satisfies the numerosity requirement. Accordingly, the proposed Settlement Class is so numerous that joinder of their claims is impracticable.

2. Commonality

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." *See* Fed R. Civ. P. 23(a)(2). Commonality is established if plaintiffs and class members' claims "depend on a common contention," "capable of class-wide resolution … meaning that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Because the commonality requirement may be satisfied by a single common issue, it is easily met. H. Newberg & Conte, 1 Newberg on Class Actions § 3.10, at 3-50 (1992).

There are ample issues of both law and fact that are common to the Settlement Class Members. Indeed, all of the Settlement Class Members' claims arise from a common nucleus of facts and are based on the same legal theories. By way of example, the Plaintiff alleges that (1) Hilton issued the $100 and $200 SANU certificates to Settlement Class Members who participated in Hilton timeshare presentations, (2) the Settlement Class Members attempted to redeem the SANU certificates, and (3) Hilton refused to honor the Settlement Class Members' SANU certificates. Commonality is satisfied by the existence of these common factual issues. *See Arnold v. United Artists Theatre Circuit, Inc.* 158 F.R.D. 439, 448 (N.D. Cal. 1994) (commonality requirement met by

"the alleged existence of common … practices").

Second, Plaintiff's claims are brought under legal theories common to the Settlement Class as a whole. Alleging a common legal theory alone is enough to establish commonality. *See Hanlon*, 150 F.3d at 1019 ("All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."). Here, all of the legal theories asserted by Plaintiff are common to all Settlement Class Members. Given that there are no issues of law identified by either party which would tend to affect only individual Settlement Class Members, common issues of law clearly predominate over individual ones. Thus, commonality is satisfied.

3. Typicality

Rule 23(a)(3) requires that the claims of the representative plaintiff be "typical of the claims … of the class." *See* Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *See Hanlon*, 150 F.3d at 1020. In short, to meet the typicality requirement, the representative Plaintiff simply must demonstrate that the Settlement Class Members have the same or similar grievances. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

Plaintiff Elder's claims are typical of those of the Settlement Class. Like those of the Settlement Class, his claim arises out of Hilton's refusal to honor his SANU certificate. Plaintiff Elder participated in a timeshare presentation, received a SANU certificate and had his certificate rejected by Hilton. Plaintiff Elder has precisely the same claims as the Settlement Class. Supported by the same legal theories, Plaintiff Elder and all Settlement Class Members share claims based on the same alleged course of conduct. Plaintiff Elder and all Settlement Class Members have been injured in the same manner by this conduct. Therefore, Plaintiff satisfies the typicality requirement.

4. Adequacy

The final requirement of Rule 23(a) is set forth in subsection (a)(4) which requires that the

representative parties "fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(4). A plaintiff will adequately represent the interests of the class where: (1) plaintiff and his counsel do not have conflicts of interest with other class members, and (2) where plaintiff and his counsel prosecute the action vigorously on behalf of the class. *See Staton v. Boeing Co.*, 327 F.3d 938, 958 (9th Cir. 2003). Moreover, adequacy is presumed where a fair settlement was negotiated at arm's-length. 2 *Newberg on Class Actions, supra,* § 11.28, at 11-59.

Class Counsel have vigorously and competently pursued the Settlement Class Members' claims. The arm's-length settlement negotiations that took place over more than six months and the detailed and comprehensive investigation they undertook demonstrate that Class Counsel adequately represent the Settlement Class. Moreover, Plaintiff Elder and Class Counsel have no conflicts of interest with the Settlement Class. Rather, Plaintiff Elder, like each absent Settlement Class Member, has a strong interest in proving Hilton's course of conduct and in obtaining redress. In pursuing this litigation, Class Counsel, as well as Plaintiff Elder, have advanced and will continue to advance and fully protect the common interests of all Settlement Class Members. Class Counsel has demonstrated an extensive experience and expertise in prosecuting complex class actions and consumer class actions. Class Counsel are active practitioners who are highly experienced in class action and consumer fraud litigation. *See* Ex. 5 to the Fisher Decl. and Ex. 1 to the Eisinger Decl. (firm resumes of Bursor & Fisher, P.A. and Eisinger Law Firm, PLLC). Accordingly, Rule 23(a)(4) is satisfied.

B. The Class Satisfies Rule 23(b)(3)

In addition to meeting the prerequisites of Rule 23(a), Plaintiff must also meet one of the three requirements of Rule 23(b) to certify the proposed class. *See Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1186 (9th Cir. 2001). Under Rule 23(b), a class action may be maintained if "the court finds that the questions of law or fact common to the members of the class 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." *See* Fed. R. Civ. P. 23(b)(3). Certification under Rule 23(b)(3) is appropriate "whenever the actual interests of the

parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022.

1. *Common Questions of Law and Fact Predominate*

The proposed Settlement Class is well-suited for certification under Rule 23(b)(3) because questions common to the Settlement Class Members predominate over questions affecting only individual Settlement Class Members. Predominance exists "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022. As the U.S. Supreme Court has explained, when addressing the propriety of certification of a settlement class, courts take into account the fact that a trial will be unnecessary and that manageability, therefore, is not an issue. *Amchem*, 521 U.S. at 620

In this case, common questions of law and fact exist and predominate over any individual questions, including in addition to whether this Settlement is reasonable (*see Hanlon*, 150 F.3d at 1026-27), *inter alia*: (1) whether Hilton's representations regarding the SANU certificates were false and misleading or reasonably likely to deceive consumers; (2) whether Hilton violated the CLRA, UCL or the FAL; (3) whether Hilton breached an express and/or implied warranty; (4) whether Hilton breached its contract with Settlement Class Members; (5) whether Hilton defrauded Plaintiff and Settlement Class Members; (6) whether Hilton engaged in negligent misrepresentations regarding the SANU certificates; and (7) whether Plaintiff and the Settlement Class have been injured by the wrongs complained of, and if so, whether Plaintiff and the Settlement Class are entitled to damages, injunctive and/or other equitable relief, including restitution or disgorgement, and if so, the nature and amount of such relief.

2. *A Class Action is the Superior Mechanism for Adjudicating this Dispute*

The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of the Settlement Class. Each individual Settlement Class Member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Hilton's liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for

inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

Moreover, since this action will now settle, the Court need not consider issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial."). Accordingly, common questions predominate and a class action is the superior method of adjudicating this controversy.

VI. THE PROPOSED NOTICE PROGRAM PROVIDES ADEQUATE NOTICE AND SHOULD BE APPROVED

Once preliminary approval of a class action settlement is granted, notice must be directed to class members. For class actions certified under Rule 23(b)(3), including settlement classes like this one, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). In addition, Rule 23(e)(1) applies to any class settlement and requires the Court to "direct notice in a reasonable manner to all class members who would be bound by a proposal." Fed R. Civ. P. 23(e)(1).

When a court is presented with a class-wide settlement prior to the certification stage, the class certification notice and notice of settlement may be combined in the same notice. *Manual*, § 21.633 at 321-22 ("For economy, the notice under Rule 23(c)(2) and the Rule 23(e) notice are sometimes combined."). This notice allows the settlement class members to decide whether to opt out, participate in the class, or object to the settlement. *Id.*

The requirements for the content of class notices for (b)(3) classes are specified in Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii). Each of the proposed forms of notice, including the Long Form and Short Form notices, meet all of these requirements, as detailed in the following table:

Requirement	Long Form	Short Form
"The nature of the action." Fed. R. Civ. P. 23(c)(2)(B)(i).	First introductory bullet; Q&A nos. 2 and 5.	Col. 1, ¶ 1.
"The definition of the class certified." Fed. R. Civ. P. 23(c)(2)(B)(ii).	Second introductory bullet; Q&A no. 4.	Col. 1, ¶ 2.
"The class claims, issues, or defenses." Fed. R. Civ. P. 23(c)(2)(B)(iii).	First introductory bullet; Q&A nos. 2, 5 and 6.	Col. 1, ¶ 1.
"That a class member may enter an appearance through an attorney if the member so desires." Fed. R. Civ. P. 23(c)(2)(B)(iv).	Q&A nos. 16-18, 20.	Col. 2, ¶ 2.
"That the court will exclude from the class any member who requests exclusion." Fed. R. Civ. P. 23(c)(2)(B)(v).	Table of "Your Legal Rights and Options;" Q&A nos. 11, 12 and 13.	Col. 2, ¶ 1.
"The time and manner for requesting exclusion." Fed. R. Civ. P. 23(c)(2)(B)(vi).	Table of "Your Legal Rights and Options;" Q&A no. 11,	Col. 2, ¶ 1.
"The binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B)(vii).	Table of "Your Legal Rights and Options"; Q&A nos. 9, and 22.	Col. 1, ¶ 5.

In addition to meeting the specific legal requirements of Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii), the proposed notices are based on the Federal Judicial Center's ("FJC") model forms for notice of pendency of a class action. FJC prepared these models at the request of the Subcommittee on Class Actions of the U.S. judicial branch's Advisory Committee on the Federal Rules of Civil Procedure. *See* www.fjc.gov. The FJC models are designed to illustrate how attorneys and judges might comply with Fed. R. Civ. P. 23(c)(2)(B)'s requirement that class action notices "must concisely and clearly state in plain, easily understood language" specific information about the nature and terms of a class action and how it might affect potential class members' rights. *See* www.fjc.gov. FJC explained its methodology for preparing these models as follows:

> We began this project by studying empirical research and commentary on the plain language drafting of legal documents. We then tested several notices from recently closed class actions by presenting them to nonlawyers, asking them to point out any unclear terms, and testing their comprehension of various subjects. Through this process, we identified areas where reader comprehension was low. We found, for example, that nonlawyers were often confused at the outset by use of the terms "class" and "class action." Combining information from the pilot test with principles gleaned from psycholinguistic research, we drafted preliminary illustrative class action notices and forms. We then asked a lawyer-linguist to evaluate them for readability and redrafted the notices in light of his suggestions.

Id. FJC then tested the redrafted model notices "before focus groups composed of ordinary citizens from diverse backgrounds" and also through surveys "[u]sing objective comprehension measures." *Id.*

Based on FJC's testing, Plaintiff and Class Counsel believe that each of the proposed class notices, which are very closely based on FJC models, with the format and content adopted almost verbatim in most instances, are accurate, balanced, and comprehensible.

These notices will be disseminated by direct notice by email or U.S. mail to each of the approximately 10,021 Settlement Class Members, based on address information to be provided by the Defendants. Accordingly, it will not be necessary to rely on any sort of publication notice to reach the Settlement Class Members as each Settlement Class Member will receive direct notice of the Settlement. A dedicated settlement website will also be created to provide additional information to Settlement Class Members about the case and the Settlement. Class Members will be able to email, write, or call the Settlement Administrator on a toll-free number with any questions or to request additional information. The proposed Settlement Administrator, Dahl Administration, is a nationally recognized leader in class settlement administration whose principals have managed thousands of class settlements. A copy of the firm's resume is attached to the Declaration of Mark Fellows, a principal of Dahl Administration, submitted in support of this Motion. *See* Fellows Decl. The Fellows Declaration provides further details of the notice plan for this case, which is designed to provide direct notice to at least 95% of the Class Members and easily satisfies the requirements of Rule 23.

VII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court approve the Settlement Agreement, provisionally certify the Settlement Class for the purposes of preliminary approval, approve the proposed notice plan, appoint as Class Representative Timothy Elder, appoint as Settlement Class Counsel Timothy Fisher and Jana Eisinger, and enter the [Proposed] Order Preliminarily Approving Class Action Settlement, submitted herewith.

Dated: June 16, 2017

Respectfully Submitted,

BURSOR & FISHER, P.A.

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