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Zicam, LLC and Matrix Initiatives, Inc.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

YESENIA MELGAR, on Behalf of Herself and
all Others Similarly Situated,

Plaintiff,

v.

ZICAM LLC and MATRIXX INITIATIVES,
INC.

Defendants.

Case No. 2:14-cv-00160-MCE-AC

Hon. Morrison C. England, Jr.

STIPULATION OF SETTLEMENT

1 This Stipulation of Settlement (the “Stipulation”) is made by Yesenia Melgar, (the “Plaintiff”
2 or “Class Representative”), on behalf of herself and the Settlement Class (defined below), on the one
3 hand, and Defendants Matrixx Initiatives Inc. and Zicam LLC (hereinafter “Defendants”), on the
4 other hand, (collectively referred to as the “Parties”) subject to and conditioned upon Court approval
5 of the terms and conditions hereof.

6 **RECITALS**

7 A. On January 21, 2014, Plaintiff Yesenia Melgar commenced an action entitled *Melgar*
8 *v. Zicam LLC, et al* (United States District Court, Eastern District of California, Case No. 2:14-cv-
9 00160-MCE-AC) (the “Action”), as a proposed class action, asserting claims under the Magnuson-
10 Moss Act 15 U.S.C. § 2301, *et seq.*, Civil Code § 1750 *et seq.* (the Consumers Legal Remedies Act
11 or “CLRA”), California Business and Professions Code § 17200 *et seq.* (the Unfair Competition
12 Law or “UCL”), California Business and Professions Code § 17500 *et seq.* (the False Advertising
13 Law or “FAL”), and for Breach of Express Warranty, Breach of Implied Warranty of
14 Merchantability, and Breach of Implied Warranty of Fitness for a Particular Purpose. Plaintiff
15 alleges, *inter alia*, that Defendants deceived customers by falsely representing the Zicam Products
16 (defined below) reduce the duration and severity of a cold.

17 B. On February 21, 2014, Plaintiff Yesenia Melgar filed a First Amended Complaint
18 (“FAC”) asserting the same claims. Dkt. No. 10.

19 C. Defendants answered the FAC on March 18, 2014, denying liability. Dkt. No. 11.

20 D. The Parties then engaged in extensive discovery, including many fact and expert
21 depositions, and the exchange of multiple written discovery responses and tens of thousands of
22 documents.

23 E. On April 3, 2015, Plaintiff filed a Motion for Class Certification. Dkt. Nos. 24, 41.
24 Defendants opposed Plaintiff’s Motion. Dkt. Nos. 30, 39, 93. On March 31, 2016, the Court
25 granted Plaintiff’s motion and certified two classes: (1) Purchasers who bought RapidMelts
26 Original, RapidMelts Ultra, Oral Mist, Ultra Crystals, Liqui-Lozenges, Lozenges Ultra, and
27 Chewables after February 15, 2011 in California, Delaware, D.C., Kansas, Missouri, New Jersey,
28 Ohio, Utah, Virginia and West Virginia; and (2) All members of the Class who purchased the

1 Products in California. Dkt. No. 116.

2 F. On May 21, 2015, Defendants filed a Motion for Partial Summary Judgment on
3 Plaintiff's claims for injunctive relief. Dkt. No. 33. Plaintiff did not oppose Defendants' motion.
4 Dkt. No. 51. On March 31, 2016, the Court granted Defendants' motion. Dkt. No. 116.

5 G. On July 28, 2015, Defendants filed a Motion to Strike Plaintiff's Supplemental
6 Designation of Experts with an Ex Parte Application for an Order Shortening Time to Hear
7 Defendants' Motion to Strike Plaintiff's Supplemental Expert Designation. Dkt. Nos. 55, 56, 62,
8 87. Plaintiff opposed both Defendants' Motion to Strike and Defendants' Ex Parte Application.
9 Dkt. Nos. 56, 63, 78. On July 31, 2015, Magistrate Judge Claire denied Defendants' Ex Parte
10 Application for an Order Shortening Time. Dkt. No. 64. On September 9, 2015, Magistrate Judge
11 Claire granted Defendants' motion to strike the supplemental designation of Dr. Edzard Ernst, and
12 denied Defendants' motion to strike the supplemental designation of Dr. Elizabeth Howlett. Dkt.
13 No. 94.

14 H. On August 6, 2015, Defendants filed a Motion for Summary Judgment or in the
15 Alternative Summary Adjudication. Dkt. Nos. 69, 109. *See also* Dkt. No. 107 (seeking leave to file
16 second MSJ). Plaintiff opposed Defendants' motion. Dkt. No. 99. On March 31, 2016, the Court
17 denied Defendants' motion. Dkt. No. 116. *See also* Dkt. No. 114 (granting leave to file second
18 MSJ).

19 I. On August 6, 2015, Defendants filed a Motion to Exclude Opinion Testimony of
20 Designated Expert Noel R. Rose, M.D., Ph.D., and a Motion to Exclude Opinion Testimony of
21 Designated Expert R. Barker Bausell Ph.D. Dkt. Nos. 70, 71, 110, 111. Plaintiff opposed
22 Defendants' motions. Dkt. No. 96. On March 31, 2016, the Court denied Defendants' motions.
23 Dkt. No. 116.

24 J. On December 11, 2017, the Parties filed their Joint Pretrial Conference Statement.
25 Dkt No. 152. This was followed shortly by the filing of Plaintiff's Trial Brief (Dkt. No. 154) and
26 Motions in Limine (Dkt. No. 155) and Defendants' Trial Brief (Dkt. No. 158) and Motions in
27 Limine (Dkt. No. 157) on December 18, 2017. On January 11, 2018, the Parties filed oppositions to
28 each other's Motions in Limine. Dkts. No. 173 and 174.

1 K. Class Counsel (defined below) conducted an examination and investigation of the
2 facts and law relating to the matters alleged in this Action, including, but not limited to, engaging in
3 discovery, review and analysis of Defendants' documents and data, retention and consultation of
4 experts regarding the Zicam Products. Class Counsel also evaluated the merits of the Parties'
5 contentions and evaluated this Settlement, as it affects all parties, including Settlement Class
6 Members. The Class Representative and Class Counsel, after taking into account the foregoing,
7 along with the risks and costs of further litigation, and the desire to provide prompt and effective
8 relief to the Settlement Class Members, represent that they are satisfied that the terms and
9 conditions of this Settlement are fair, reasonable, and adequate, and that this Settlement is in the
10 best interest of the Settlement Class Members (defined below).

11 L. Defendants have expressly denied and continue to deny all claims, contentions and
12 charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts
13 and/or omissions alleged, or that could have been alleged in the Action. Notwithstanding their view
14 that Plaintiff's claims are meritless and their continued denial of all allegations of wrongdoing and
15 all liability with respect to all claims, Defendants consider it desirable to resolve the action to avoid
16 further expense, inconvenience, and burden, and therefore have determined that this settlement on
17 the terms set forth herein is appropriate. Neither the Stipulation nor any actions taken to carry out
18 the Settlement are intended to be, nor may they be deemed or construed to be, an admission or
19 concession of liability, or of the validity of any claim, defense, or of any point of fact or law on the
20 part of any party. Defendants deny the material allegations of the complaint in this action. Neither
21 the Stipulation, nor the fact of settlement, nor settlement proceedings, nor the settlement
22 negotiations, nor any related document, shall be used as an admission of any fault or omission by
23 Defendants, or be offered or received in evidence as an admission, concession, presumption, or
24 inference of any wrongdoing by Defendants in any proceeding.

25 M. Substantial settlement negotiations have taken place between the Parties. The Parties
26 engaged in four separate settlement attempts before this Stipulation was reached. On October 21,
27 2014, the Parties attended a settlement conference before Magistrate Judge Kendall J. Newman.
28 Dkt. No. 20. On December 16, 2015, the Parties attended a mediation with Justice Fred K.

1 Morrison (Ret.) at JAMS in Sacramento. On May 17, 2017, the Parties attended a mediation with
2 the Honorable Frank Maas (Ret.) at JAMS in New York. Finally, on February 15 and 16, 2018, the
3 parties attend a two-day mediation with Kenneth Feinberg in New York.

4 N. In consideration of the covenants and agreements set forth herein, and of the releases
5 and dismissals of claims as described below, and other good and valuable consideration, the receipt
6 and sufficiency of which hereby is acknowledged by each of the Parties, the Class Representative,
7 on behalf of herself and the Settlement Class Members, and Defendants agree for settlement
8 purposes only to the Settlement described herein, subject to Court approval, under the following
9 terms and conditions:

10 **I. DEFINITIONS**

11 1.1 “Claim Form” means the document to be submitted by Settlement Class Members
12 seeking cash payment pursuant to this Stipulation. The Claim Form will be available online at the
13 Settlement Website (defined below) and the contents of the Claim Form will be approved by the
14 Court. The Parties shall request the Court approve the Claim Form substantially in the form
15 attached hereto and made a part hereof as Exhibit A.

16 1.2 “Claimant” means a Settlement Class Member who submits a claim for cash
17 payment as described in Section II of this Stipulation.

18 1.3 “Class Counsel” means the law firm of Bursor & Fisher, P.A.

19 1.4 “Class Notice” means the Court-approved notice plan described in Section IV below.

20 1.5 “Class Representative” means Plaintiff Yesenia Melgar.

21 1.6 “Court” means the United States District Court, Eastern District of California.

22 1.7 “Defendants’ Counsel” means the law firms of Drinker Biddle & Reath LLP and
23 Kirkland & Ellis LLP.

24 1.8 “District Court Final Approval Date” means the day on which the Court’s Settlement
25 Approval Order and Final Judgment (defined below) is entered.

26 1.9 “Fee and Expense Award” means the amount that may be awarded to Class Counsel
27 by the Court for attorneys’ fees, costs, and expenses.

28 1.10 “Final Settlement Approval Date” means the later of thirty (35) days after entry of

1 the Settlement Approval Order and Final Judgment or expiration of the time to appeal from the
2 Settlement Approval Order and Final Judgment without any appeal being taken, or if an appeal or
3 request for review (including but not limited to a request for reconsideration or rehearing, or a
4 petition for a writ of certiorari) has been taken, the date on which the Settlement Approval Order
5 and Final Judgment has been affirmed by the court of last resort to which an appeal or request for
6 review has been taken and such affirmance is no longer subject to further appeal or review, or the
7 date of denial of review after exhaustion of all appellate remedies.

8 1.11 “Incentive Award” means any award not to exceed \$10,000, sought by application to
9 and approved by the Court that may be payable to the Class Representative from the Settlement
10 Fund.

11 1.12 “Long Form Notice” means the Court-approved long form of notice to be posted to
12 the Settlement Website (defined below), pursuant to the Media Plan (defined below). The Parties
13 shall request the Court approve the Long Form Notice substantially in the form attached hereto and
14 made a part hereof as Exhibit B.

15 1.13 “Media Plan” means the Settlement Administrator’s plan to disseminate Class Notice
16 to Settlement Class Members. The Media Plan will be designed to reach no fewer than seventy-five
17 (75) percent of the Settlement Class Members.

18 1.14 “Notice and Other Administrative Costs” means all costs and expenses actually
19 incurred by the Settlement Administrator (defined below) in the publication of Class Notice,
20 establishment of the Settlement Website (defined below) and the processing, handling, reviewing,
21 and paying of claims made by Claimants.

22 1.15 “Parties” means Yesenia Melgar, Zicam LLC, and Matrixx Initiatives Inc.

23 1.16 “Preliminary Approval” means that the Court has entered an order preliminarily
24 approving the terms and conditions of this Stipulation, including the manner of providing and
25 content of notice to Settlement Class Members. The Parties shall request the Court to enter the
26 proposed Preliminary Settlement Approval Order substantially in the form attached hereto and
27 made a part hereof as Exhibit C.

28 1.17 “Preliminary Approval Date” means the date on which the Court enters an Order

1 granting Preliminary Approval.

2 1.18 “Released Persons” means and includes Defendants and all of Defendants’ past and
3 present respective parents, subsidiaries, divisions, affiliates, persons and entities directly or
4 indirectly under its or their control in the past or in the present, Defendants’ respective assignors,
5 predecessors, successors, and assigns, and all past or present partners, shareholders, managers,
6 members, directors, officers, employees, agents, attorneys, insurers, accountants, and
7 representatives of any and all of the foregoing.

8 1.19 “Settlement Administrator” means RG/2 Claims Administration LLC and its
9 successors and assigns.

10 1.20 “Settlement Class Members” or “Settlement Class” means:

11 All purchasers of Zicam RapidMelts Original, RapidMelts Ultra, Oral Mist,
12 Ultra Crystals, Liqui-Lozenges, Lozenges Ultra, Soft Chews, Medicated
13 Fruit Drops, and Chewables in the United States from February 15, 2011 to
14 the date of the order granting preliminary approval of the settlement in this
15 action. Excluded from this definition are the Released Persons. Settlement
16 Class Members who exclude themselves from the Settlement, pursuant to the
17 procedures set forth in Section V of the Stipulation, shall no longer
18 thereafter be Settlement Class Members and shall not be bound by this
19 Stipulation and shall not be eligible to make a claim for any benefit under
20 the terms of this Stipulation.

21 1.21 “Settlement Class Period” means the period of time from February 15, 2011 through
22 the date of the order granting preliminary approval of the settlement in this Action.

23 1.22 “Settlement Fund” means the total commitment of Defendants for purposes of this
24 settlement, as described in Section II of this Stipulation, with a total value of \$16 million
25 (\$16,000,000.00), paid by Defendants for purposes of effectuating the settlement of this Action, the
26 payment and disposition of which is subject to the provisions of this Stipulation, including
27 paragraphs 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 3.1, and 3.2, below.

28 1.23 “Settlement Approval Order and Final Judgment” means an order and judgment
issued and entered by the Court, substantially in the form as that attached hereto and made a part
hereof as Exhibit D, approving this Stipulation as binding upon the Parties and the Settlement Class
Members and dismissing the Action with prejudice, and setting the amount for an award of

1 attorneys' fees not to exceed one-third of the total \$16 million value of the Settlement Fund, plus
2 any award of costs and expenses, to Class Counsel as determined by the Court. The Settlement
3 Approval Order and Final Judgment shall constitute a judgment within the meaning and for
4 purposes of Rule 54 of the Federal Rules of Civil Procedure. The Parties shall request the Court to
5 enter the proposed Settlement Approval Order and Final Judgment substantially in the form
6 attached hereto and made a part hereof as Exhibit D.

7 1.24 "Settlement Website" means a website operated and maintained by the Settlement
8 Administrator solely for purposes of making available to the Settlement Class Members the
9 documents, information, and online claims submission process referenced in paragraphs 2.4 through
10 2.6 below.

11 1.25 "Short Form Notice" means the Court-approved form of notice for publication to
12 Settlement Class Members, pursuant to the Media Plan. The Parties shall request the Court approve
13 the Short Form Notice substantially in the form attached hereto and made a part hereof as Exhibit E.

14 1.26 "Zicam Products" means RapidMelts Original, RapidMelts Ultra, Oral Mist, Ultra
15 Crystals, Liqui-Lozenges, Lozenges Ultra, Soft Chews, Medicated Fruit Drops, and Chewables.

16 1.27 As used herein, the plural of any defined term includes the singular thereof and the
17 singular of any defined term includes the plural thereof, as the case may be.

18 **II. SETTLEMENT CONSIDERATION**

19 2.1 Benefit to Settlement Class Members from the Settlement Fund. The Settlement
20 Fund will be used to provide benefits to or on behalf of the Settlement Class. Defendants will
21 contribute \$16,000,000 for payment of the following: (i) valid claims for benefits submitted by
22 Settlement Class Members pursuant to paragraph 2.4 below; (ii) the Notice and Other
23 Administrative Costs actually incurred by the Settlement Administrator as described in paragraph
24 4.5 below; (iii) the Fee and Expense Award, as may be ordered by the Court and as described in
25 paragraph 3.1 below, and (iv) any Incentive Award to the Class Representative, not to exceed
26 \$10,000 as may be ordered by the Court and as described in paragraph 3.2 below.

27 2.2 Total Financial Commitment. Defendants' total financial commitment and
28 obligation under this Stipulation, subject to Court approval, shall not exceed \$16,000,000.

1 2.3 Schedule of Payments into Settlement Fund. Defendants shall make payments into
2 the Settlement Fund in accordance with the following schedule:

3 a. *Notice and Other Administrative Costs.* Amounts equal to the cost of
4 publishing the Class Notice and other administrative costs, to be paid within thirty (30) days of
5 when such amounts are invoiced to Defendants for work completed and become due and owing.

6 b. *Fee and Expense Award.* An amount equal to the Fee and Expense Award, to
7 be paid as described at paragraph 3.1, below.

8 c. *Incentive Award.* An amount equal to any Incentive Award, not to exceed
9 \$10,000, as may be ordered by the Court and as described at paragraph 3.2, below.

10 d. *Payment of Valid Claims.* An amount equal to \$16,000,000.00, less the sum
11 of (i) the total Notice and Other Administrative Costs, (ii) the Fee and Expense Award, and (iii) the
12 Incentive Award, which amount is to be paid within ten (10) days of the Final Settlement Approval
13 Date.

14 2.4 Claims Process. Each Settlement Class Member shall be entitled to submit a claim
15 for reimbursement, consistent with this paragraph.

16 a. *Cash Payment.* Each Settlement Class Member may submit a claim, either
17 electronically through a settlement website or by mail, for each of the Zicam Products he, or she,
18 purchased during the Class Period, provided such claim includes attestation to the purchase or
19 purchases under penalty of perjury. Reimbursements will be made according to the average
20 manufacturer's suggested retail price ("MSRP") during the Class Period for each of the Zicam
21 Products to each Settlement Class Member who submits a valid claim. A Settlement Class
22 Member's claim for reimbursement pursuant to this paragraph shall be considered a "Claim." The
23 amount payable to each Settlement Class Member making a valid Claim shall be determined by the
24 Settlement Administrator. If the amount of cash available for the Settlement Fund is insufficient to
25 pay all valid Settlement Class Member Claims, individual payment amounts for Claims shall be
26 reduced on a pro-rata basis as described in paragraph 2.7 below. If the amount of cash available
27 from the Settlement Fund is more than the total cash value of valid Claims, cash payments will be
28 increased on a pro-rata basis, such that the Settlement Fund will be completely exhausted.

1 b. *Payment from Fund.* Claims will be paid, after the Claim Period Close Date
2 (as defined in paragraph 2.6) and after the Final Settlement Approval Date, whichever is later, from
3 the Settlement Fund. Claims will be paid from the amount of the Settlement Fund remaining after
4 payment of the Fee and Expense Award, Notice and Other Administrative Costs, and the Incentive
5 Award.

6 2.5 Proof of Claim. Claims for up to five units of the Zicam Products purchased during
7 the Class Period will be paid without submission of proof of purchase. Claims for six or more units
8 of the Zicam Products purchased during the Class Period will require proof of purchase. A
9 Claimant must include information in the Claim Form – completed online or in hard copy mailed to
10 the Settlement Administrator – confirming under penalty of perjury the following: (i) the number
11 and type of Zicam Product(s) purchased, (ii) the location of purchase, and (iii) that the purchase or
12 purchases were made within the Settlement Class Period. In the event that a Claimant fails to
13 provide proof of purchase for a Claim of six or more units of the Zicam Products purchased during
14 the Class Period, then his or her claim will be reduced to a claim of five units of the Zicam
15 Products. To determine which Zicam Products will be included in this reduced claim, the
16 Settlement Administrator will include the five Zicam Products so claimed with the highest MSRP.

17 2.6 Review of Claims. The Settlement Administrator shall be responsible for reviewing
18 all claims to determine their validity. The Settlement Administrator shall reject any claim that does
19 not comply in any material respect with the instructions on the Claim Form or the terms of
20 paragraphs 2.4 and 2.5, above, or is submitted after the close of the claim period set by the Court
21 (“Claim Period Close Date”).

22 2.7 Pro-Rata Distribution of Benefits. Receipt of total valid Settlement Class Member
23 Claims, determined in accordance with paragraphs 2.4 and 2.5 above, exceeding the available
24 portion of the Settlement Fund (after payment of the Fee and Expense Award, Notice and Other
25 Administrative Costs, and the Incentive Award) will reduce the cash payout for each class member
26 on a pro rata basis. Similarly, receipt of total valid Settlement Class Member Claims less than the
27 available portion of the Settlement Fund (after payment of the Fee and Expense Award, Notice and
28 Other Administrative Costs, and the Incentive Award) will increase the cash payout for each class

1 member on a pro rata basis.

2 2.8 Uncleared Checks. Those Settlement Class Members whose cash benefit checks are
3 not cleared within one hundred eighty (180) days after issuance shall be ineligible to receive a cash
4 settlement benefit and Defendants shall have no further obligation to make any payment pursuant to
5 this Stipulation or otherwise to such Settlement Class Members. All unpaid funds from uncleared
6 checks shall remain in the Settlement Fund pending further order of the Court. Following
7 consultation with Defendants’ counsel, Class Counsel shall make an application to the Court to seek
8 approval for a proposed disposition of the unpaid funds from uncleared checks.

9 2.9 Notice to Attorneys General. Not later than ten (10) days after the Motion for
10 Preliminary Approval of the Settlement is filed in court, the Settlement Administrator shall in
11 consultation with Defendants’ counsel provide notice of the proposed class action settlement to the
12 appropriate state officials (i.e. each state attorney general) and the Attorney General of the United
13 States pursuant to 28 U.S.C. § 1715, and the costs of such notice shall be paid from the Settlement
14 Fund.

15 **III. CLASS COUNSEL ATTORNEYS’ FEES AND EXPENSES AND CLASS**
16 **REPRESENTATIVE INCENTIVE AWARD**

17 3.1 Attorneys’ Fees, Costs and Expenses. Class Counsel shall apply to the Court for
18 payment of an award of attorneys’ fees, of up to one-third of the total \$16,000,000 value of the
19 Settlement Fund. Class Counsel shall also apply separately for an award of their costs and
20 expenses from the Settlement Fund. Such fees, costs and expenses, if approved by the Court, shall
21 be payable within 30 days following the District Court’s fee award, which shall under no
22 circumstances occur prior to the Settlement Approval Order and Final Judgment, subject to Class
23 Counsel executing the Undertaking Regarding Attorneys’ Fees and Costs (the “Undertaking”)
24 attached hereto as Exhibit F, and providing all payment routing information and tax I.D. numbers
25 for Class Counsel. Notwithstanding the foregoing, if the final Settlement Approval Order and
26 Final Judgment or any part of it is vacated, overturned, reversed, or rendered void or unenforceable
27 as a result of an appeal, or the Stipulation is voided, rescinded, or otherwise terminated for any
28 other reason, then Class Counsel shall, within thirty (30) days, repay to Defendants the full amount

1 of the attorneys' fees and costs paid by Defendants to Class Counsel, plus accrued interest at a rate
2 of 2.5% per annum. In such event, the following persons shall be jointly and severally liable for
3 the return of such payments: (a) Bursor & Fisher, P.A., and (b) Scott A. Bursor. To effectuate this
4 provision, Bursor & Fisher, P.A., Scott A. Bursor, and L. Timothy Fisher shall, within ten (10)
5 calendar days of the Preliminary Approval Order, execute and deliver to Defendants for filing with
6 the Court the Undertaking in the form attached as Exhibit F.

7 3.2 Incentive Award. Class Counsel will petition the Court for approval of an Incentive
8 Award payable to the Class Representative in an amount not to exceed \$10,000.00. Defendants
9 shall pay such award by wire transfer or check to Class Counsel within thirty-five (35) calendar
10 days after the Final Settlement Approval Date, subject to the prior delivery to Defendants of tax
11 I.D. number(s) for the Class Representative.

12 **IV. NOTICE TO CLASS AND ADMINISTRATION OF SETTLEMENT**

13 4.1 Class Notice. The Class Notice shall consist of the Long Form Notice and the Short
14 Form Notice. The Class Notice shall conform to all applicable requirements of the Federal Rules
15 of Civil Procedure, the United States Constitution (including the Due Process Clauses), and any
16 other applicable law, and shall otherwise be in the manner and form approved by the Court. Class
17 notice and claims administration will be provided by RG/2 Claims Administration LLC with a
18 media plan designed to achieve no less than seventy-five (75) percent reach. Direct notice will be
19 provided to Settlement Class Members for whom Defendants have contact information.

20 4.2 General Notice Terms. The Class Notice shall:
21 a. inform Settlement Class Members that, if they do not exclude themselves
22 from the Class, they may be eligible to receive the relief under the proposed settlement;
23 b. contain a short, plain statement of the background of the Action, the class
24 certification and the proposed settlement;
25 c. describe the proposed settlement relief outlined in this Stipulation; and
26 d. state that any relief to Settlement Class Members is contingent on the
27 Court's final approval of the proposed settlement.

1 4.3 Notice of Exclusion and Objection Rights. The Class Notice shall inform
2 Settlement Class Members of their rights to exclude themselves from the Class or object to the
3 proposed settlement, as described in paragraph 5.3 below. The Class Notice shall further inform
4 Settlement Class Members that any judgment entered in the Actions, whether favorable or
5 unfavorable to the Class, shall include, and be binding on, all Settlement Class Members who have
6 not been excluded from the Class, even if they have objected to the proposed settlement and even if
7 they have any other claim, lawsuit or proceeding pending against Defendant(s).

8 4.4 Time and Manner of Notice. Class Notice shall be provided as set forth in the
9 Media Plan; media delivery of Class Notice shall be completed within thirty (30) days after the
10 Preliminary Approval Date. Direct notice will be provided to Settlement Class Members for whom
11 Defendants have contact information.

12 4.5. Responsibilities of Settlement Administrator. The Parties will retain RG/2 Claims
13 Administration LLC to help implement the terms of the proposed Stipulation. The Settlement
14 Administrator shall be responsible for administrative tasks, including, without limitation, (a)
15 notifying the appropriate state and federal officials about the settlement, (b) arranging for
16 distribution of Class Notice (in the form approved by the Court) and Claim Forms (in a form
17 ordered by the Court) to Settlement Class Members, (c) answering inquiries from Settlement Class
18 Members and/or forwarding such written inquiries to Class Counsel and Defendants' Counsel, (d)
19 receiving and maintaining on behalf of the Court and the Parties any Settlement Class Member
20 correspondence regarding requests for exclusion from the settlement, (e) establishing the
21 Settlement Website that posts notices, Claim Forms and other related documents, (f) receiving and
22 processing claims and distributing payments to Settlement Class Members, and (g) otherwise
23 assisting with implementation and administration of the Stipulation terms. The actual costs and
24 expenses of the Settlement Administrator, which are referred to as the Notice and Other
25 Administrative Costs, will be paid from the Settlement Fund.

26 4.6. Performance Standards of Settlement Administrator. The contract with the
27 Settlement Administrator shall obligate the Settlement Administrator to abide by the following
28 performance standards:

1 a. The Settlement Administrator shall accurately and neutrally describe, and
2 shall train and instruct its employees and agents to accurately and objectively describe, the
3 provisions of this Stipulation in communications with Settlement Class Members;

4 b. The Settlement Administrator shall provide prompt, accurate and objective
5 responses to inquiries from Class Counsel or their designee, Defendants and/or Defendants'
6 Counsel, and shall periodically report on claims, objectors, exclusions, and related matters.

7 c. The Settlement Administrator shall seek clarification, instruction or
8 authorization for performance of its duties and expenditure or disposition of cash from both Class
9 Counsel and their designee and from Defendants and/or Defendants' Counsel or their designee.

10 **V. CLASS SETTLEMENT PROCEDURES**

11 5.1 Settlement Approval. As soon as practical after the signing of this Stipulation, the
12 Class Representative shall file an amended complaint that includes all of the Zicam Products and
13 seeks certification of a nationwide class of all purchasers of the Zicam Products from February 15,
14 2011 through the date of the order granting preliminary approval of this settlement. The Class
15 Representative will also move for a certification of a nationwide class for settlement purposes only
16 and Preliminary Approval Order, conditionally certifying the nationwide Settlement Class,
17 preliminarily approving the terms and conditions of this Stipulation as fair, reasonable, and
18 adequate, and in the best interests of the Settlement Class Members, approving notice to the
19 Settlement Class Members as described in Section IV above, and setting a hearing to consider final
20 approval of the Settlement and any objections thereto.

21 5.2 Settlement Approval Order and Final Judgment. At or before the final approval
22 hearing, the Class Representative shall move for entry of a Settlement Approval Order and Final
23 Judgment substantially in the form as that attached hereto and made a part hereof as Exhibit D,
24 granting final approval of this Settlement and holding this Stipulation to be fair, reasonable, and
25 adequate, and in the best interests of the Settlement Class Members, and binding (as of the Final
26 Settlement Approval Date) on all Settlement Class Members who have not excluded themselves as
27 provided below, and ordering that the Settlement relief be provided as set forth in this Stipulation,
28 ordering the releases as set forth in Section VI below to be effective on the Final Settlement

1 Approval Date, and entering judgment in the Action.

2 5.3 Exclusions and Objections. The Class Notice shall advise all Settlement Class
3 Members of their right: (a) to be excluded from the Settlement, or (b) to object to the Settlement.
4 If, within such time as is ordered by the Court and contained in the Class Notice, any Settlement
5 Class Member wishes to be excluded from the Settlement, he or she must do so by timely mailing a
6 valid opt-out notice, as described in the Class Notice. Any Settlement Class Member who timely
7 elects to opt out of the Settlement shall not be permitted to object to the Settlement. Persons falling
8 within the definition of the Settlement Class who validly and timely request exclusion from the
9 Settlement effected by this Stipulation, pursuant to the procedures set forth in this paragraph, shall
10 not be Settlement Class Members, shall not be bound by this Stipulation and shall not be eligible to
11 make a claim for any benefit under the terms of this Stipulation.

12 5.4 At least seven (7) calendar days prior to the final approval hearing, Class Counsel
13 shall prepare or cause the Settlement Administrator to prepare a list of the persons who have
14 excluded themselves in a valid and timely manner from the Settlement Class (the "Opt-Outs"), and
15 Class Counsel shall file that list with the Court. If, within such time as is ordered by the Court and
16 contained in the Class Notice, any Settlement Class Member wishes to object to the Settlement
17 and/or to be heard, he or she must, on or before the deadlines established by the Court, submit to
18 the Settlement Administrator a written notice of objection and/or request to be heard. Such
19 communication shall state the name and address of the Settlement Class Member, shall include
20 information sufficient to demonstrate membership in the Settlement Class, shall state the grounds
21 for each objection asserted, and shall state whether the Settlement Class Member intends to appear
22 at the final approval hearing.

23 5.5 Stay of the Action. The Parties shall request that the Court, in connection with
24 Preliminary Approval, issue an immediate stay of the Action.

25 5.6 Effect If Settlement Not Approved. This Stipulation is being entered into only for
26 purposes of settlement, subject to and without waiver of the Parties' respective rights. If the Court
27 does not enter the order granting Preliminary Approval or does not grant final approval, or if the
28 Final Settlement Approval Date does not occur, Class Counsel and Defendants' Counsel shall

1 endeavor, consistent with the Stipulation, to cure any defect identified by the Court; provided,
2 however, that Defendants shall not be obligated to accept such cure if it increases the cost or
3 burden of the Stipulation to Defendants or any of the other Released Persons or reduces or
4 otherwise affects the scope of the releases provided by this Stipulation. In the event that the
5 Stipulation is terminated for any reason, final approval does not occur for any reason, or the Final
6 Settlement Approval Date does not occur, then no term or condition of the Stipulation, or any draft
7 thereof, or any discussion, negotiation, documentation, or other part or aspect of the Parties'
8 settlement discussions shall have any effect, nor shall any such matter be admissible in evidence
9 for any purpose in the Action, or in any other proceeding, and the Parties shall be restored to their
10 respective positions immediately preceding execution of this Stipulation. If the final Settlement
11 Approval Order and Final Judgment or any part of it is vacated, overturned, reversed, or rendered
12 void as a result of an appeal, or the Stipulation is voided, rescinded, or otherwise terminated for
13 any other reason, then within thirty (30) days, Class Counsel shall return to Defendants all
14 attorneys' fees, costs, and other payments received by Class Counsel under the Stipulation, as set
15 forth in paragraph 3.1 above, plus any accrued interest at a rate of 2.5% per annum. The Parties
16 agree that all drafts, discussions, negotiations, documentation, or other information prepared in
17 relation to the Stipulation and the Parties' settlement discussions shall be treated as strictly
18 confidential and may not be disclosed to any person other than the Parties' counsel, and only for
19 purposes of the settlement of this Action, and may not be used for any purpose other than for the
20 settlement of this Action.

21 5.7 Termination. The Stipulation shall have no effect unless and until this Stipulation is
22 fully executed by all Parties.

23 **VI. RELEASES**

24 6.1 Release by Settlement Class Members. Effective as of the Final Settlement
25 Approval Date, each and all of the Settlement Class Members (except any such person who has
26 filed a proper and timely request for exclusion and any person or entity that purchased Zicam
27 Products for purposes of resale and not for his/her/its own consumption (i.e., "Resellers"), but
28

1 solely in such Reseller capacity) shall be deemed to have, and by operation of law shall have, fully,
2 finally and forever released, relinquished, and discharged, and shall be forever barred from
3 asserting, instituting, or maintaining against any or all of the Released Persons, any and all claims,
4 demands, actions, causes of action, lawsuits, arbitrations, damages, or liabilities whether legal,
5 equitable, or otherwise, relating in any way to the claims asserted or the factual or legal allegations
6 made in the Action, including without limitation the alleged inefficacy of the Zicam Products
7 and/or the purchase of any of the Zicam Products at any time on or after February 15, 2011 through
8 the date of the Preliminary Approval Order (collectively, the “Claims”). With respect to the
9 Claims released pursuant to this paragraph, each Settlement Class Member shall be deemed to have
10 waived, relinquished and released all claims that have or could have been asserted in the action
11 consistent with the broadest scope of release permitted under *Hesse v. Sprint Corp.*, 598 F. 3d 581,
12 590 (9th Cir. 2010). This release shall be interpreted to the fullest extent permitted by law, and
13 each Settlement Class Member shall be deemed to have waived any and all provisions, rights and
14 benefits conferred by California Civil Code section 1542 (and equivalent, comparable, or
15 analogous provisions of the laws of the United States of America or any state or territory thereof,
16 or of the common law or civil law). Section 1542 provides that:

17 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
18 **WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT**
19 **TO EXIST IN HIS OR HER FAVOR AT THE TIME OF**
20 **EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM**
21 **OR HER MUST HAVE MATERIALLY AFFECTED HIS OR**
22 **HER SETTLEMENT WITH THE DEBTOR.**

21 Thus, as of the Final Settlement Approval Date, each Settlement Class Member shall be deemed to
22 have expressly waived and fully, finally, and forever settled and released any known or unknown,
23 suspected or unsuspected, contingent or noncontingent claim with respect to the Claims, whether or
24 not concealed or hidden, without regard to subsequent discovery of existence of different or
25 additional facts. Each and every term of this paragraph shall inure to the benefit of each and all of
26 the Released Persons, and each and all of their respective successors and personal representatives,
27 which persons and entities are intended to be beneficiaries of this paragraph. For avoidance of
28

1 doubt, this Release of Claims does not release any claims of Resellers of Zicam Products in their
2 capacity as such.

3 6.2 Effectuation of Settlement. None of the above releases affects the Parties' rights or
4 claims to enforce the terms of the Stipulation.

5 6.3 No Admission of Liability. This Stipulation reflects, among other things, the
6 compromise and settlement of disputed claims among the parties, and neither this Stipulation nor
7 the releases given herein, nor any consideration therefor, nor any actions taken to carry out this
8 Stipulation, are intended to be, nor may they be deemed or construed to be, an admission or
9 concession of liability, or the validity of any claim, defense, or of any point of fact or law on the
10 part of any party. Defendants deny the material allegations of the complaint filed in this Action.
11 Neither this Stipulation, nor the fact of settlement, nor the settlement proceedings, nor the
12 settlement negotiations, nor any related document, shall be used as an admission of any fault or
13 omission by any or all of the Released Persons, or be offered or received in evidence as an
14 admission, concession, presumption or inference of any wrongdoing or liability by any or all of the
15 Released Persons in any civil, criminal, administrative or other proceeding in any court, agency or
16 tribunal, other than such proceedings as may be necessary to consummate, interpret or enforce this
17 Stipulation.

18 **VII. CERTIFICATION OF SETTLEMENT CLASS**

19 7.1 The Parties agree, for settlement purposes only and solely pursuant to the terms of
20 this Stipulation, that this Action shall, subject to Court approval, conditionally be certified and
21 proceed as a nationwide class action under Federal Rule of Civil Procedure 23(b)(3) for settlement
22 purposes only, with a class consisting of all Settlement Class Members, and with Yesenia Melgar
23 as Class Representative and with Class Counsel as counsel for the Settlement Class Members.

24 7.2 Any certification of a conditional, preliminary or final settlement class pursuant to
25 the terms of this Settlement shall not constitute, and shall not be construed as, an admission on the
26 part of Defendants that this Action, or any other proposed or certified class action, is appropriate
27 for nationwide class treatment pursuant to Federal Rule of Civil Procedure or any similar state or
28 federal class action statute or rule. Neither the fact of this settlement nor this Stipulation shall be

1 used in connection with efforts in any proceeding to seek nationwide or any other certification of
2 any claims asserted against Defendants.

3 7.3 In the event the Court does not approve the settlement and Stipulation, then this
4 conditional certification is null and void, shall have no force or effect, and shall not be used or
5 referred to for any purposes whatsoever in the Action or in any other case or controversy. In such
6 an event, this Stipulation and all negotiations and proceedings related thereto shall be deemed to be
7 without prejudice to the right of the Parties, who shall be restored to their respective positions as of
8 the date of this Stipulation, and Defendants shall not be deemed to have waived any opposition or
9 defenses it has to any aspect of the claims asserted in the Action or to whether those claims or the
10 Action may properly be maintained as a class action.

11 **VIII. MISCELLANEOUS PROVISIONS**

12 8.1 Change of Time Periods. The time periods and/or dates described in this Stipulation
13 with respect to the giving of notices and hearings are subject to approval and change by the Court or
14 by the written agreement of Class Counsel and Defendants' Counsel, without notice to Settlement
15 Class Members. The Parties reserve the right, by agreement and subject to the Court's approval, to
16 grant any reasonable extension of time that might be needed to carry out any of the provisions of
17 this Stipulation.

18 8.2 Time for Compliance. If the date for performance of any act required by or under
19 this Stipulation falls on a Saturday, Sunday, or court holiday, that act may be performed on the next
20 business day with the same effect as if it had been performed on the day or within the period of time
21 specified by or under this Stipulation.

22 8.3 Governing Law. This Stipulation is intended to and shall be governed by the laws of
23 the State of California without giving effect to principles of conflicts of laws.

24 8.4 Entire Agreement. The terms and conditions set forth in this Stipulation constitute
25 the complete and exclusive statement of the agreement between the parties relating to the subject
26 matter of this Stipulation, superseding all previous negotiations and understandings, and may not be
27 contradicted by evidence of any prior or contemporaneous agreement. The Parties further intend
28 that this Stipulation constitutes the complete and exclusive statement of its terms as between the

1 parties, and that no extrinsic evidence whatsoever may be introduced in any agency or judicial
2 proceeding, if any, involving this Stipulation. Any modification of the Stipulation must be in
3 writing signed by Class Counsel and Defendants.

4 8.5 Advice of Counsel. The determination of the terms and the drafting of this
5 Stipulation have been by mutual agreement after negotiation, with consideration by and
6 participation of all parties and their counsel. The presumption found in California Civil Code
7 section 1654 (and equivalent, comparable, or analogous provisions of the laws of the United States
8 of America or any state or territory thereof, or of the common law or civil law) that uncertainties in
9 a contract are interpreted against the party causing an uncertainty to exist is waived by all parties.

10 8.6 Binding Agreement. This Stipulation shall be binding upon and inure to the benefit
11 of the respective heirs, successors, and assigns of the Parties, the Settlement Class Members and the
12 other Released Persons.

13 8.7 No Waiver. The waiver by any party of any provision or breach of this Stipulation
14 shall not be deemed a waiver of any other provision or breach of this Stipulation.

15 8.8 Execution in Counterparts. This Stipulation shall become effective upon its
16 execution by all of the undersigned. The parties may execute this Stipulation in counterparts, and
17 execution of counterparts shall have the same force and effect as if all parties had signed the same
18 instrument. The parties further agree that signatures provided by portable document format (PDF)
19 or other electronic transmission shall have the same force and effect as original signatures.

20 8.9 Enforcement of this Stipulation. The Court shall retain jurisdiction, and shall have
21 exclusive jurisdiction, to enforce, interpret, and implement this Stipulation, and the terms of any
22 order entered pursuant to this Stipulation.

23 8.10 Best Efforts. The Parties and their undersigned counsel agree to undertake
24 their best efforts and mutually cooperate to promptly effectuate this Stipulation and the terms of the
25 settlement set forth herein, including taking all steps and efforts contemplated by this Stipulation
26 and any other steps and efforts which may become necessary by order of the Court or otherwise.

27 8.11 Notices. All notices to the Parties or counsel required by this Stipulation shall be
28 made in writing and communicated by email and mail to the following address:

1 If to Class Representative, Settlement Class Members, or Class Counsel:

2 L. Timothy Fisher
3 Bursor & Fisher, P.A.
4 1990 North California Blvd., Suite 940
5 Walnut Creek, CA 94596
6 Telephone: (925) 300-4455
7 E-Mail: ltfisher@bursor.com

8 If to Defendants or Defendants' Counsel:

9 Robyn Bladow
10 Kirkland & Ellis LLP
11 333 South Hope Street
12 Los Angeles, CA 90071
13 Telephone: (213) 680-8400
14 E-Mail: robyn.bladow@kirkland.com

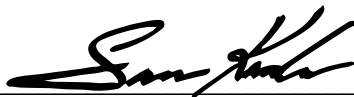
15 IN WITNESS HEREOF the undersigned, being duly authorized and intending to be legally
16 bound hereby, have caused this Stipulation to be executed on the dates shown below and agree that it
17 shall take effect on the date it is executed by all of the undersigned.

18 **APPROVED AND AGREED:**

19 DATED: May ___, 2018

20 _____
21 Plaintiff Yesenia Melgar

22 DATED: May 3, 2018

23 
24 _____
25 Samir Kamdar
26 CFO and COO
27 Zicam LLC and Matrixx Initiatives, Inc.

1 If to Class Representative, Settlement Class Members, or Class Counsel:

2 L. Timothy Fisher
3 Bursor & Fisher, P.A.
4 1990 North California Blvd., Suite 940
5 Walnut Creek, CA 94596
6 Telephone: (925) 300-4455
7 E-Mail: ltfisher@bursor.com

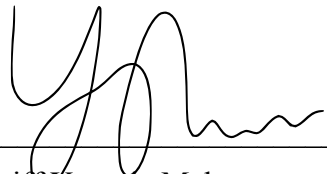
8 If to Defendants or Defendants' Counsel:

9 Robyn Bladow
10 Kirkland & Ellis LLP
11 333 South Hope Street
12 Los Angeles, CA 90071
13 Telephone: (213) 680-8400
14 E-Mail: robyn.bladow@kirkland.com

15 IN WITNESS HEREOF the undersigned, being duly authorized and intending to be legally
16 bound hereby, have caused this Stipulation to be executed on the dates shown below and agree that it
17 shall take effect on the date it is executed by all of the undersigned.

18 **APPROVED AND AGREED:**

19 DATED: May 2, 2018

20 
21 _____
22 Plaintiff Yesenia Melgar

23 DATED: May ___, 2018

24 _____
25 Samir Kamdar
26 CFO and COO
27 Zicam LLC and Matrixx Initiatives, Inc.