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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**

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DAVID AMBROSE, on behalf of himself and all  
others similarly situated,

Plaintiff,

v.

THE KROGER CO.,

Defendant.

Case No. 3:20-cv-04009-EMC

**NOTICE OF MOTION AND  
MOTION FOR FINAL APPROVAL  
OF CLASS ACTION SETTLEMENT  
AGREEMENT**

Date: September 30, 2021  
Time: 1:30 p.m.  
Location: Courtroom 5  
Judge: Hon Edward M. Chen

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**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE THAT** on September 30, 2021 at 1:30 p.m., or as soon thereafter as this matter may be heard in the courtroom of the Honorable Edward M. Chen, Plaintiff David Ambrose (“Plaintiff”) individually and on behalf of the proposed Class,<sup>1</sup> will, and hereby does, respectfully move this Court for entry of an order: (i) granting final approval of the proposed settlement set forth in the class action Stipulation of Settlement (the “Settlement”); (ii) confirming certification of the Settlement Class as defined in the Settlement; and (iii) entering the Final Judgment and Dismissal Order.

Plaintiff’s motion is based on the attached Memorandum of Points and Authorities in Support of Final Approval of Class Action Settlement; the Declaration of Mark N. Todzo in Support of Plaintiff’s Motion for Final Approval of Class Action Settlement (“Todzo Decl.”) and the exhibits attached thereto; the Declaration of David Ambrose in Support of Plaintiff’s Motion for Final Approval of Class Action Settlement (“Ambrose Decl.”); the Settlement filed on July 29, 2021; all other pleadings and matters of record; and such additional evidence or argument as may be presented at the hearing.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. SUMMARY OF ARGUMENT**

The Settlement resolves the claims in the operative Complaint. In the Complaint, Plaintiff alleges that The Kroger Co. (“Kroger” or “Defendant”) engaged in false and misleading marketing and advertising of its Simple Truth Brand disposable plates, bowls and platters (the “Challenged Products”) [ECF No. 1]. The lawsuit alleges the Challenged Products are not compostable, contrary to Defendant’s labeling and advertising because they contain per- and polyfluoroalkyl substances (“PFAS”). The Settlement remedies the concerns expressed in the lawsuit Plaintiff filed on behalf of all California purchasers of these Challenged Products, who allegedly paid a

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<sup>1</sup> All capitalized terms not defined herein shall have the same meanings set forth in the Settlement filed on July 29, 2021. [ECF No. 43-1, Exh. 1].

1 premium for them over comparable products that did not purport to be compostable. As discussed  
2 below, the Settlement is fair, reasonable, and adequate, and thus merits final approval. The  
3 Settlement gives class members the injunctive relief Plaintiff sought when he filed the Complaint,  
4 by requiring Defendant to remove the “compostable” representations from all labels, advertising,  
5 marketing materials, and packaging of the Challenged Products. The Settlement does not release  
6 any claims for monetary relief by absent class members. Therefore, the proposed Settlement  
7 should be finally approved by the Court.

## 8 II. BACKGROUND

### 9 A. Procedural History.

10 On June 16, 2020, Plaintiff Ambrose filed the Complaint in the United States District  
11 Court for the Northern District of California [ECF No. 1]. Ambrose alleges claims under  
12 California consumer protection statutes for injunctive and monetary relief on behalf of a class of  
13 similarly situated consumers who purchased Kroger Simple Truth disposable plates and bowls  
14 based on purported representations that such products were “compostable” when they allegedly  
15 contained PFAS, which are “forever chemicals” that do not degrade and contaminate the compost  
16 stream. *Id.* The complaint alleges that Kroger’s conduct, as described above, violated: (1) the  
17 unlawful, unfair, and fraudulent prongs of California’s Unfair Competition Law (“UCL”), Cal.  
18 Bus. & Prof. Code §§ 17200 *et seq.*; (2) the Guides for use of Environmental Marketing Claims  
19 published by the Federal Trade Commission (the “Green Guides”), Cal. Bus. & Prof. Code  
20 §17500 *et seq.*, and (3) the express-warranty provisions of California’s Commercial Code, Cal.  
21 Com. Code § 2313. *Id.* On August 31, 2020, Kroger answered the Complaint. [ECF No. 13].

22 On October 21, 2020, Plaintiff served his first set of Requests for Production of  
23 Documents. *Todzo Decl.* ¶5. Defendant responded on November 30, 2020 and supplemented its  
24 responses on January 22, 2021. *Id.* Defendant served its first set of Requests for Production of  
25 Documents and Interrogatories on February 5, 2021 and Plaintiff responded on March 9, 2021.  
26 Defendant produced 5,800 pages of documents, which Plaintiff reviewed. *Id.*

1           **B. Settlement Negotiations.**

2           On March 23, 2021, the Parties and their counsel participated in a mediation with Hon.  
3 Carl West (Ret.). *See* Todzo Decl. ¶7. Prior to the mediation, Kroger provided Plaintiffs with  
4 confidential information regarding its California sales of the Challenged Products and the  
5 Challenged Products labeling during the class period. *Id.* at ¶6. These data disclosed that sales of  
6 the Challenged Products in California were significantly lower than Plaintiff had anticipated. In  
7 advance of the mediation Plaintiff provided Settling Defendant with test data supporting his  
8 claims. At the mediation, the Parties reached an agreement in principle to resolve this litigation.  
9 *Id.* at ¶7. On July 26, 2021, the Parties signed the Settlement.

10           On July 29, 2021, Plaintiff filed a motion for preliminary approval of a settlement between  
11 Plaintiff and Defendant. [ECF No. 43]. On August 19, 2021, this Court requested information  
12 from the Parties with respect to the Settlement and the Parties provided such information on  
13 August 23, 2021. [ECF Nos. 45 and 46]. On August 31, 2021 the Court ordered the Parties to  
14 provide information regarding total number and dollar sales of the Covered Products, Plaintiff's  
15 test data, information related to any additional risks of litigation, Plaintiff's lodestar and the total  
16 number of hours spent by the named Plaintiff in assisting with the case. [ECF No. 48]. On  
17 September 1, 2021, the Parties jointly responded to the Court's Order Requesting Supplemental  
18 Briefing and Evidence. [ECF No. 49].

19           **C. Settlement Terms.**

20           Under the terms of the settlement, Kroger will remove all compostability representations  
21 from the labels, advertising, marketing materials, and packaging of the Challenged Products in  
22 exchange for a release of claims for injunctive relief arising from Kroger's violations of the UCL,  
23 the Green Guides, and the express-warranty provisions of the California Commercial Code (or  
24 other similar state or federal laws) regarding its alleged misrepresentations of the Challenged  
25 Products' compostability. In doing so, Kroger will cure the injurious conduct at the heart of this  
26 case to the benefit of Plaintiff, the Class, and future purchasers. The Settlement *does not* release  
27 any claims for damages related to the underlying violations by absent class members.

1 The Settlement also includes an award of a portion of Plaintiff’s attorneys’ fees of  
 2 \$195,000 and an incentive award to Plaintiff of \$5,000 for his time spent working on the case.

3 **D. Preliminary Approval of the Settlement.**

4 On September 2, 2021, the Parties appeared before the Court by Zoom. The next day, the  
 5 Court issued an Order granting the motion for preliminary approval, finding that the Settlement  
 6 appeared “sufficiently, adequate, fair, and reasonable to warrant preliminary approval.” See ECF  
 7 No. 50. In reaching this determination, the Court considered several factors, including the range  
 8 of possible recovery by Plaintiffs, any litigation risks, the discovery taken prior to settlement, and  
 9 the experience and views of counsel. *Id.* Because all Class members receive the benefit of the  
 10 injunctive relief provided by the Settlement, and no Class member relinquishes their right to seek  
 11 monetary relief based on the claims at issue, the Settlement does not preclude absent Class  
 12 members from bringing individual claims based on the underlying violations.

13 The Court also directed Plaintiff’s counsel to post the Settlement, terms of the settlement,  
 14 and fees requested on Plaintiff’s counsel’s website, as well as issue a press release to alert the  
 15 public of the Settlement. Plaintiff’s counsel contracted with a company to send out the press  
 16 release, which was released on September 9, 2021 and also posted copies of both the press release  
 17 and the Settlement on its website on that same date. Copies of this motion as well as Plaintiff’s  
 18 motion for attorneys’ fees will be posted as soon as they are filed. As of the date of this filing, no  
 19 absent class members have contacted Plaintiff’s counsel regarding the Settlement. Todzo Decl. ¶8.

20 **III. ARGUMENT**

21 **A. Standards for Judicial Approval of Class Action Settlements.**

22 A proposed settlement may be approved by the court if it is determined to be “fundamentally  
 23 fair, adequate, and reasonable.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000)  
 24 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). It is well-established in the  
 25 Ninth Circuit that “voluntary conciliation and settlement are the preferred means of dispute  
 26 resolution.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). Class  
 27 action suits are primarily suited for compromise because of the difficulties of proof, the uncertainties  
 28



1 of the outcome and the typical length of the litigation. “[T]here is an overriding public interest in  
 2 settling and quieting litigation,” and this is “particularly true in class action suits.” *Van Bronkhorst*  
 3 *v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *Rael v. Children's Place, Inc.*, No. 3:16-CV-  
 4 00370-GPC-LL, 2020 WL 434482, at \*10 (S.D. Cal. Jan. 28, 2020); *see also Churchill Village,*  
 5 *L.L.C. v. General Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Util. Reform Project v. Bonneville Power*  
 6 *Admin.*, 869 F.2d 437, 443 (9th Cir. 1989).<sup>2</sup>

7 In approving a proposed settlement of a class action under Federal Rule of Civil Procedure  
 8 23(e), the court must find that the proposed settlement is “fair, adequate and reasonable.”<sup>3</sup> The  
 9 Ninth Circuit has provided a list of factors which may be considered in evaluating the fairness of a  
 10 class action settlement including: (1) the strength of plaintiffs’ case, (2) the risk, expense,  
 11 complexity, and likely duration of further litigation; (3) the risk of maintaining class action status  
 12 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed; (6)  
 13 the stage of the proceedings; and (7) the experience and views of counsel. *See Officers for Justice,*  
 14 688 F.2d at 625; *accord Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

15 The district court must exercise sound discretion in approving a settlement. *Torrissi*, 8 F.3d  
 16 at 1375; *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff’d*, 661 F.2d 939  
 17 (9th Cir. 1981). Nevertheless, there is a strong initial presumption of fairness to a proposed  
 18 settlement if the settlement is reached by experienced counsel after arm’s-length negotiations, and  
 19 great weight is accorded to the recommendations of counsel, who are most closely acquainted with  
 20 the facts of the underlying litigation. *Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 WL  
 21 34089697, \*7 (W.D. Wash. Mar. 26, 2001). Therefore, in exercising its discretion, “the court’s  
 22 intrusion upon what is otherwise a private consensual agreement negotiated between the parties to  
 23 a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is  
 24

25  
 26 <sup>2</sup> The law always favors the compromise of disputed claims, *Williams v. First Nat’l Bank of*  
 27 *Pauls Valley*, 216 U.S. 582, 595 (1910); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir.  
 1995); *MWS Wire Indus., Inc. v. Cal. Fine Wire Co.*, 797 F.2d 799, 802 (9th Cir. 1986).

28 <sup>3</sup> *Pac. Enters.*, 47 F.3d at 377; *Officers for Justice*, 688 F.2d at 625.

1 not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that  
2 the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Officers for*  
3 *Justice*, 688 F.2d at 625.

4 This Court considered many of these factors in granting Plaintiff’s motion for preliminary  
5 approval of the settlement. [ECF No. 50]. In its Order, the Court noted that it had considered the  
6 range of recovery for Plaintiffs, the risks of litigation, the extent of discovery completed, and the  
7 experience and views of counsel, among others, in its decision to grant preliminary approval of the  
8 Settlement. *Id.* In addition, at the Court’s request, the Parties provided additional information  
9 regarding Defendant’s sales information, Plaintiff’s test data, Plaintiff’s litigation risks, Plaintiff’s  
10 lodestar information, and Plaintiff’s incentive award information. *See* ECF Nos. 46, 48 and 49.  
11 The Parties also appeared before the Court on September 2, 2021 in support of preliminary  
12 approval of the Settlement. [ECF No. 50].

13 Because the Settlement provides substantial benefits to the Settlement Class by ensuring that  
14 Kroger no longer markets, advertises or sells the Challenged Products as “compostable,” it provides  
15 injunctive relief to the Class while avoiding both the uncertainty and the delay that would be  
16 associated with further litigation. As explained below and in the Declaration of Mark N. Todzo,  
17 application of these criteria demonstrates that the Settlement warrants final Court approval.

#### 18 **B. The Strength of Plaintiff’s Case.**

19 The relief secured by the Settlement is fair. While Plaintiff is confident that he could  
20 establish liability and recover damages on a class-wide basis were the case to move forward and  
21 eventually go to trial, Kroger disputes all of Plaintiff’s claims, including that the Challenged  
22 Products contain PFAS and the accuracy of Plaintiff’s test results and test methodology.

23 In addition, because there is presently no federal or state law that sets a standard level of  
24 PFAS in single-use foodware products or a specific standard for compostability of products  
25 containing PFAS, Plaintiff would have to borrow from private and municipal standards to prove  
26 his case. *See* ECF No. 49 and Todzo Decl. ¶12. While private and municipal standards are  
27 helpful to Plaintiff, he would still be fashioning new law, which is always a risky proposition.

1 Proving liability would also be an expert intensive endeavor because the Court must  
2 determine: (1) the proper methodology for testing PFAS; (2) whether the Products contain PFAS  
3 when using the test methodology identified by the Court; (3) whether the presence of PFAS,  
4 which do not break down over time, precludes a product from being compostable; (4) whether  
5 PFAS in a product designed to be composted contaminates the compost stream with a toxin; and  
6 (5) whether FDA approval of a particular PFAS chemical used in a product provides a safe-harbor  
7 for that product from a finding that it poses the threat of toxic contamination to compost. Todzo  
8 Decl. ¶13. Assuming that Plaintiff was able to prove liability, he would then need to present  
9 evidence that the Products were sold at a premium due to the compostability claim. Plaintiff  
10 believes that he would be able to do so, but Defendant argues that there is no premium at all.  
11 Regardless, due to the expert intensive nature of proving both liability and monetary relief, such  
12 an undertaking poses a significant litigation risk for Plaintiff. *Id.* Accordingly, there are  
13 considerable risks in continuing the litigation.

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

15 To determine whether the proposed settlement is fair, reasonable and adequate, the Court  
16 must balance the continuing risks of litigation against the benefits afforded to Class members and  
17 the immediacy and certainty of a substantial recovery. *See In re Mego*, 213 F.3d at 458; *Girsh v.*  
18 *Jepson*, 521 F.2d 153, 157 (3rd Cir. 1975); *Boyd v. Bechtel Corp*, 485 F. Supp. 610, 616-617 (N.D.  
19 Cal. 1979).

20 Approval of the Settlement will mean immediate injunctive relief for all Class members,  
21 which will benefit Plaintiff, the Class, and is in the public interest. Todzo Decl. at ¶9. If not for the  
22 Settlement, this case would be on track for class certification, extensive motion work, expert  
23 depositions, and further summary judgment motions followed by trial. *Id.* at ¶10. If this case were  
24 to go to trial, it would occupy a number of attorneys for many weeks and would require substantial  
25 and costly expert testimony on both sides. *Id.* In addition, there would be substantial delays in the  
26 injunctive relief benefits provided to the Class for some years. *Id.*

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1 In sum, the risks posed by continued litigation are substantial, and they would be present at  
2 every step of the litigation if it were to continue. *See* ECF No. 49.

3 **D. The Stage of the Proceedings and the Amount of Discovery Completed.**

4 The stage of the proceedings and the amount of discovery completed is one of the factors  
5 that courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *See*  
6 *In re Mego*, 213 F.3d at 459 (9th Cir. 2000); *Ellis*, 87 F.R.D. at 18; *Boyd v. Bechtel Corp.*, 485  
7 F. Supp. 610, 616-17 (N.D. Cal. 1979). Here, the Settlement was reached only after Plaintiff and  
8 Defendant responded to written discovery and shared key documents, such as test and sales data.  
9 Todzo Decl. ¶¶5-6. Defendant produced approximately 5,800 pages prior to the mediation, which  
10 Plaintiff reviewed.

11 This discovery ensured sophisticated and meaningful settlement negotiations, which were  
12 conducted over the course of the litigation. Todzo Decl. ¶6. As a result, the Parties have a  
13 comprehensive understanding of the strengths and weaknesses of the case and have sufficient  
14 information to make an informed decision regarding the fairness of the settlement. *See In re*  
15 *Mego*, 213 F.3d at 459. For example, the sales information provided by Defendant indicated that  
16 it sold approximately 628,412 units of Challenged Products, totaling \$2,710,479 between June 16,  
17 2016 and December 31, 2020. Because any damages would have been based on a compostability  
18 premium (i.e., Plaintiff would have to prove that there was a price premium for the compostable  
19 attribute of the Products), damages would be a fraction of the \$2,710,479. Todzo Decl. ¶6.

20 **E. The Experience and Views of Counsel.**

21 It has long been accepted that the view of the attorneys actively conducting the litigation,  
22 while not conclusive, “is entitled to significant weight” when evaluating a settlement. *Fisher Bros.*  
23 *v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985); *Ellis*, 87 F.R.D. at 18 (“the  
24 fact that experienced counsel involved in the case approved the settlement after hard-fought  
25 negotiations is entitled to considerable weight”). This action has been litigated and settled by  
26 experienced and competent counsel on both sides of the case. Plaintiff’s counsel is well known for  
27 their decades of experience and success in complex and class action litigation. Todzo Decl., ¶15.

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1 Defense counsel are, likewise, extremely sophisticated and experienced litigators. That such  
2 qualified and well-informed counsel endorse the Settlement as being fair, reasonable, and adequate  
3 heavily favors this Court's approval of the Settlement.

4 **F. The Attorneys' Fees and Service Awards Are Reasonable.**

5 As set forth in detail in greater detail in the Motion for Award of Attorneys' Fees,  
6 Reimbursement of Costs and Service Awards, as well as in the Declaration of Mark N. Todzo, and  
7 the Declaration of David Ambrose, the fee awards are fair and reasonable. *See also* ECF No. 49-  
8 1. The attorneys' fees award sought by Plaintiff of \$195,000 is less than Class Counsel's lodestar.  
9 *See* Todzo Decl. ¶¶32-33. Accordingly, the award is reasonable under the applicable law. *See,*  
10 *e.g., Relente v. Viator, Inc.*, No. 12-CV-05868-JD, 2015 WL 3613713, at \*1 (N.D. Cal. June 9,  
11 2015) (attorney fee award pursuant to class action settlement must be calculated using lodestar  
12 method where plaintiffs' claims were based on California law).

13 In addition, Plaintiff Ambrose has been a diligent and committed Plaintiff. Mr. Ambrose  
14 worked with his counsel throughout all stages of litigation, including in putting together the pre-  
15 suit demand, responding to written discovery, engaging in a full day mediation, and reviewing  
16 settlement related drafts and documents. *See* Ambrose Decl., ¶¶1-4. Plaintiff estimates he has  
17 spent in excess of 20 hours working on this case. *Id.* Accordingly, the \$5,000 service award to  
18 Plaintiff is reasonable.

19 For all of these reasons, preliminary approval of the settlement should be granted.

20 **IV. CONCLUSION**

21 For the reasons discussed herein and in the Todzo Declaration, Plaintiff respectfully requests  
22 that the Court approve the Settlement of this litigation as fair, reasonable, and adequate.  
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DATED: September 16, 2021

Respectfully submitted,  
  
LEXINGTON LAW GROUP

By: /s/ Mark N. Todzo  
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Attorneys for Plaintiff DAVID AMBROSE, on  
Behalf of Himself and All Others Similarly  
Situated

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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**

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Defendant.

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COSTS AND SERVICE AWARDS**

Date: September 30, 2021  
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**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE THAT** on September 30, 2021 at 1:30 p.m., or as soon thereafter as this matter may be heard in the courtroom of the Honorable Edward M. Chen, Plaintiff David Ambrose will, and hereby does, respectfully apply to this Court for an award of attorneys' fees of \$195,000 and services an award to the class representative in the total amount of \$5,000. As required by the Settlement Agreement, Plaintiff makes this motion pursuant to the Federal Rules of Civil Procedure Rule 23(e) and California's private attorney general statute, Cal. Code Civ. Pro. § 1021.5. Settlement §IV.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the accompanying Declaration of Mark N. Todzo and exhibits attached thereto, the Declaration of David Ambrose, the other papers on file in this action, and such other submissions or arguments that may be presented before or at the hearing on this motion.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Over the course of the litigation, counsel for Plaintiff and the class (“Class Counsel”) spent  
4 more than 400 hours investigating, litigating, and settling this case. Plaintiff David Ambrose  
5 (“Plaintiff”) asks that the Court grant his application for an award of attorneys’ fees of \$195,000  
6 pursuant to the Federal Rules of Civil Procedure Rule 23(e) and California’s private attorney  
7 general statute, Cal. Code Civ. Pro. § 1021.5.

8 California law governs the right to a fee in this case as well as the method of calculating  
9 that fee. Under California law, successful plaintiffs are entitled to recover their fees using a  
10 lodestar method. Here, Plaintiff prevailed by reaching a settlement with Defendant The Kroger  
11 Co. (“Defendant”) that provides injunctive relief to the absent class without infringing on the  
12 rights of absent class members to sue for damages. The lodestar approach must therefore be used  
13 to calculate Class Counsel’s fees.

14 Under California’s two-step lodestar procedure, the Court first calculates the lodestar value  
15 by multiplying the hours reasonably spent litigating the case by reasonable hourly rates. Next, the  
16 Court may adjust the lodestar upward or downward by applying a multiplier to the lodestar figure  
17 to consider the result achieved for the class members, the contingency risk associated with the case  
18 and the quality of the representation, among other things.

19 Here, applying Class Counsel’s customary hourly rates – which are commensurate with the  
20 prevailing rates charged by attorneys that practice complex class action litigation on a non-  
21 contingent basis in this District – to the 425.4 hours Class Counsel spent through August 31, 2021  
22 representing class members yields a lodestar value of more than \$224,300, which will increase by  
23 at least \$15,400 through final resolution of this case. In addition, Class Counsel incurred \$13,275  
24 in costs and expenses since the inception of this litigation. Although a multiplier of the \$252,975  
25 lodestar would be appropriate in light of the relief obtained for the class, the significant novelty  
26 and risk associated with this case and the other lodestar enhancement factors, Class Counsel are  
27 not seeking a fee enhancement. The settlement caps any fees and costs award at \$200,000, which  
28

1 is over \$50,000 less in fees and costs incurred in this case, and less than Class Counsel’s lodestar.  
 2 Thus, the requested fees and costs are reasonable, and the Court should approve \$195,000 in  
 3 attorneys’ fees and litigation expenses.

#### 4 BACKGROUND

5 Prior to and since initiating this case in June 2020, Class Counsel have engaged in a  
 6 thorough investigation, case management efforts, discovery, and intensive settlement negotiations  
 7 including a full-day mediation.

#### 8 **I. LITIGATING THIS CASE WAS TIME AND LABOR INTENSIVE.**

##### 9 **A. Class Counsel Conducted Extensive Factual and Legal Investigation Prior to 10 Filing This Action.**

11 Plaintiff Ambrose filed this action on June 16, 2020. Declaration of Mark N. Todzo  
 12 (“Todzo Decl.”) at ¶2. Before commencing this action, Class Counsel conducted a comprehensive  
 13 examination and evaluation of the relevant law and facts to assess the merits of the claims and to  
 14 determine how to best serve the interests of the class members. *Id.* To Plaintiff’s counsel’s  
 15 knowledge, this is one of the first cases involving the impact of per- and polyfluoroalkyl  
 16 substances (“PFAS”) on the compostability of consumer goods.<sup>1</sup> Plaintiff’s attorneys spent a  
 17 significant amount of time developing this case, drafting and sending the pre-suit demand to  
 18 Defendant, and drafting and filing the Complaint, in consultation with Plaintiff and Plaintiff’s  
 19 experts. *Id.* at ¶3. Plaintiff’s attorneys also worked diligently to manage this case efficiently,  
 20 including drafting case management statements as well as the protective order and ESI stipulation.  
 21 *Id.* at ¶4. Because of the novelty of the legal issues, Class Counsel were required to conduct  
 22 significant legal research prior to filing the action. *Id.* at ¶¶2-3.

##### 23 **B. This Case Required Significant Case Management and Litigation Strategy.**

24 This complex class action required Plaintiff to expend considerable time on case

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25 <sup>1</sup> There are two other similar cases involving Plaintiff’s counsel pending in the Northern  
 26 District. *Velma Hernandez v. Huhtamaki, Inc.*, Case No. 20-cv-08155-EMC (N.D. Cal. filed June  
 27 2, 2021); *Joseph Digiacinto v. Albertsons Companies, Inc., et al.*, Case No. 20-cv-03382-KAW  
 28 (N.D. Cal. filed August 4, 2021)

1 management matters. *See* Todzo Decl. at ¶4. Plaintiff engaged in meet and confer efforts with  
2 Defendant regarding the management of the case, discovery, the litigation schedule, alternative  
3 dispute resolution and other matters. *Id.* In addition, the complexity of the case also required  
4 numerous internal strategy meetings regarding the litigation and overall case administration. *Id.*

5 **C. Class Counsel Conducted Discovery to Obtain the Information Necessary to**  
6 **Prosecute This Action.**

7 Counsel also spent a significant amount of time drafting and responding to discovery  
8 requests, meeting and conferring with Defendant's counsel and reviewing documents in order to  
9 prosecute this action. Todzo Decl. at ¶5. On October 21, 2020, Plaintiff served his First Set of  
10 Requests for Production of Documents on Defendant. *Id.* Defendant responded on November 30,  
11 2020 and supplemented its responses on January 22, 2021. *Id.* Defendant served its First Set of  
12 Requests for Production of Documents and First Set of Interrogatories on Plaintiff on February 5,  
13 2021. Plaintiff responded on March 9, 2021. Defendant produced 5,800 pages of documents,  
14 which Plaintiff reviewed. *Id.* Plaintiff was therefore well informed of the facts prior to settling  
15 the case.

16 **D. Class Counsel Engaged in Intensive Settlement Efforts with Kroger.**

17 Lastly, Class Counsel spent a significant amount of time negotiating a resolution of this  
18 case, including drafting a mediation brief, participating in a full day of mediation, drafting  
19 versions of the settlement agreement, and preparing the motion for preliminary approval of the  
20 settlement agreement. Todzo Decl. at ¶¶6-7.

21 Once the Settlement was signed, Class Counsel prepared and filed the motion for  
22 preliminary approval, which included numerous supporting documents and declarations [ECF No.  
23 43]. Todzo Decl. at ¶7. After the filing, Class Counsel worked with Defendant's counsel to file  
24 several supporting documents in response to further inquiries from the Court [ECF Nos. 46 and  
25 49]. Todzo Decl. at ¶7. Class Counsel appeared at the hearing and argued in support of  
26 preliminary approval, which the Court granted shortly after the hearing on September 3, 2021. *Id.*  
27 Since the Court preliminarily approved the Settlement, Class Counsel also posted the Settlement  
28 on its website and issued a press release. *Id.* at ¶8. Class Counsel also prepared this motion, which

1 included reviewing voluminous billing records. *Id.*

2 **II. CLASS COUNSEL’S TIME AND EXPENSES.**

3 Class Counsel have expended significant professional time and out-of-pocket expenses  
 4 litigating this case and securing the Settlement for the benefit the Class.<sup>2</sup> In total, Class Counsel  
 5 have spent over 425 hours litigating this case through August 31, 2021 resulting in a lodestar of  
 6 \$224,300, as set forth below:<sup>3</sup>

7

8 **Lexington Law Group Hours and Lodestar Broken Down by Staff and Category through August 31, 2021**

9 Timekeeper*	10 Hours by Category						11 Total Hours	12 Hourly Rate	13 Lodestar
	14 Case Development	15 Experts	16 Pleadings, Law & Motion	17 Settlement	18 Case Management & Litigation Strategy	19 Factual Discovery			
20 <b>Attorneys</b>									
M. Todzo	15.8	9	3.7	70.9	39.9	17.4	156.7	\$800	\$125,360
R. Berghoff	0	0	0	25	36.7	51.8	113.5	\$400	\$45,400
M. Merrow	5.5	0	0.8	30.7	24.1	12.2	73.3	\$325	\$23,823
E. Somers	0	0.3	0	1.2	6.4	0	7.9	\$850	\$6,715
H. Hirsch	0.5	0	0	2	5.3	0.2	8	\$750	\$6,000
J. Mann	1.6	0	0.4	0	6.6	0	8.6	\$650	\$5,590
21 <b>Law Clerks</b>									
A. Pearson	3.3	0	11.7	5.5	10.8	5.7	37	\$195	\$7,215
O. Sutter	0	0	0	0	7.4	7.5	14.9	\$195	\$2,905
L. Valpey	0	0	0	0	5.5	0	5.5	\$235	\$1,293
22 <b>Total</b>	<b>26.7</b>	<b>9.3</b>	<b>16.6</b>	<b>135.3</b>	<b>142.7</b>	<b>94.8</b>	<b>425.4</b>	<b>N/A</b>	<b>\$224,300</b>

23

24 \_\_\_\_\_

25 <sup>2</sup> All capitalized terms not defined herein shall have the same meanings set forth in the Settlement  
 26 filed on July 29, 2021. [ECF No. 43-1, Exh. 1].

27 <sup>3</sup> This does not include \$13,275 in litigation fees and costs, or the approximately 13 additional  
 28 attorney hours spent through final approval of the Settlement. Todzo Decl. at ¶¶32-33.



1 Class Counsel have also spent approximately 9 hours reviewing and drafting final approval  
 2 and anticipate spending an additional 4 hours through final approval of the Settlement resulting in  
 3 a lodestar of \$239,700. Todzo Decl. at ¶33. Class Counsel’s total lodestar and costs will be  
 4 approximately \$252,975 at the conclusion of its work on behalf of the Class. *Id.* The amounts of  
 5 the lodestar and litigation costs are eminently reasonable for a class action.

### 6 **III. THE VALUE OF THE SETTLEMENT TO THE CLASS.**

7 Assuming the Court grants Class Counsel’s request for \$195,000 in fees and costs, the  
 8 remaining \$5,000 will be paid to Plaintiff for his work prosecuting this case. *See* Todzo Decl. at  
 9 ¶36 and Settlement §IV. Because the Settlement cures the injurious conduct at the heart of this  
 10 case, but does not release any claims for damages related to the underlying violations by absent  
 11 class members, the Settlement provides a benefit to the Class. In addition, because the Settlement  
 12 provides that Defendant remove its compostability representations from the Challenged Products,  
 13 all future sales will not contain the allegedly misleading compostability representations.  
 14 Accordingly, future consumers will not unwittingly add the Challenged Products to their compost,  
 15 which will no longer contaminate compost streams, or the crops grown from such compost.

## 16 **ARGUMENT**

### 17 **I. PLAINTIFF IS ENTITLED TO RECOVER HIS ATTORNEYS’ FEES UNDER 18 CALIFORNIA FEE-SHIFTING STATUTES AND THE LODESTAR METHOD SHOULD BE USED TO CALCULATE THE AMOUNT OF THOSE FEES.**

#### 19 **A. Plaintiff’s Fee Request Is Governed By California Law.**

20 California law applies to Plaintiff’s entitlement to attorneys’ fees and the method of  
 21 calculating those fees. Because this is a diversity action, where state substantive law governs  
 22 plaintiff’s claims, “it also governs the award of fees.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,  
 23 1047 (9th Cir. 2002); *Mangold v. California Public Utilities Commission*, 67 F.3d 1470, 1478 (9th  
 24 Cir. 1995) (“The method of calculating a fee is an inherent part of the substantive right to the fee  
 25 itself, and a state right to an attorneys’ fee reflects a substantial policy of the state.”); *Wolph v.*  
 26 *Acer Am. Corp.*, C 09-01314 JSW, 2013 WL 5718440, at \*2 (N.D. Cal. Oct. 21, 2013) (“This  
 27 action asserted claims under California law and is premised on diversity jurisdiction. Therefore,  
 28

1 California law governs the determination of attorneys’ fees here.”).

2 Specifically, Plaintiff’s eligibility to recoup his attorneys’ fees is premised on Cal. Code  
3 Civ. Pro. § 1021.5. Indeed, the Settlement mandates that Class Counsel’s request to be  
4 compensated for their attorney time and litigation expenses is made pursuant to these California  
5 fee-shifting laws. Settlement § IV. Therefore, the Court should apply California state law in  
6 assessing this fee application, as both the availability of a fee award and the method of calculating  
7 that award are considered substantive issues reflecting important state policy.

8 **B. Plaintiff Is Entitled to Recover His Attorneys’ Fees Under the California’s**  
9 **Private Attorney General Statute.**

10 Plaintiff is eligible to recover his attorneys’ fees under California’s private attorney general  
11 statute, which authorizes the requested fee award. The private attorney general statute allows a  
12 court to award attorneys’ fees to a “successful party” in an action to enforce “an important public  
13 right” where: (1) a significant benefit has been conferred on a large class of persons; (2) the  
14 necessity and financial burden of the private enforcement are such as to make the award  
15 appropriate; and (3) such fees should not in the interest of justice be paid of the recovery, if any.  
16 Cal. Code Civ. P. § 1021.5. The term “successful party” requires only that the plaintiff achieve  
17 its litigation objectives, whether by judgment, settlement, or other means. *Graham v.*  
18 *DaimlerChrysler Corp.*, 101 P.3d 140, 150 (Cal. 2004). Here, for the same reasons previously  
19 discussed, Plaintiff satisfies the “successful party” standard.

20 Plaintiff meets section 1021.5’s other criteria as well. The action enforced important  
21 consumer protection rights under the UCL, and will likely discourage other companies from using  
22 similar unfair and deceptive “compostable” representations on paper products containing PFAS.  
23 *Graham*, 101 P.3d at 156 (“It is well settled that attorney fees under section 1021.5 may be  
24 awarded for consumer class action suits benefiting a large number of people.”). In addition,  
25 because the Products will no longer be marketed as “compostable,” they will not end up  
26 contaminating otherwise usable compost streams, as discussed above. The action also conferred a  
27 significant benefit on a large class of individuals who purchased Kroger Simple Truth brand  
28 plates, bowls and platters by providing injunctive relief to the Class. *See id.* Further, the necessity

1 and financial burden of private enforcement make an award appropriate. Without the incentive of  
2 an attorneys' fees award, Plaintiff could not have afforded to hire counsel to pursue this case given  
3 that the products at issue here typically cost less than \$10.

4 **C. California Law Prescribes a Lodestar Method of Calculating a Reasonable**  
5 **Fee.**

6 In fee-shifting cases, in which the responsibility to pay attorneys' fees is statutorily  
7 transferred from the prevailing plaintiff or class to the defendant, California law requires use of the  
8 lodestar method. Under California law, "[t]he starting point for every fee award . . . must be a  
9 calculation of the attorney's services in terms of the time he has expended on the case." *Serrano*  
10 *v. Priest* ("*Serrano III*"), 569 P.2d 1303 fn. 23 (Cal. 1977); *PLCM Group v. Drexler*, 997 P.2d  
11 511 (Cal. 2000) ("California courts have consistently held that a computation of time spent on a  
12 case and the reasonable value of that time is fundamental to a determination of an appropriate  
13 attorneys' fee award.") (citation omitted). The California Legislature has "endorsed the [lodestar  
14 adjustment] method of calculating fees, except in certain limited situations," and "[w]hen the  
15 Legislature has determined that the lodestar adjustment approach is not appropriate, it has  
16 expressly so stated." *Ketchum v. Moses*, 17 P.3d 735, 743 (Cal. 2001); *Meister v. Regents of U. of*  
17 *California*, 78 Cal. Rptr. 2d 913 (Cal. App. 6th Dist. 1998) ("the California Supreme Court  
18 intended its lodestar method to apply to a statutory attorney's fee award unless the statutory  
19 authorization for the award provided for another method of calculation."). Here, because Class  
20 Counsel's right to attorneys' fees is based on California fee-shifting statutes, the lodestar method  
21 is applicable to the determination of the reasonable amount of Plaintiff's attorneys' fees.

22 **D. Federal Courts Utilize the Lodestar Analysis to Calculate Attorneys' Fees in**  
23 **Class Action Cases Based on California Law.**

24 Decisions by courts in this District have repeatedly confirmed that courts should apply the  
25 lodestar/multiplier method in diversity cases arising under California law: "where, as here,  
26 plaintiff brings a state law claim, the Court looks to the state's law in deciding which method to  
27 use to calculate attorney's fees." *Relente v. Viator, Inc.*, 12-CV-05868-JD, 2015 WL 3613713, at  
28 \*1 (N.D. Cal. June 9, 2015). Similarly, in awarding attorneys' fees under a class action settlement

1 regarding misleading food labels, Judge Tigar held that “California courts apply the lodestar  
 2 method in class actions governed by California law.” *Lilly v. Jamba Juice Co.*, No. 13-cv-02998–  
 3 JST, 2015 WL 2062858, at \*5 (N.D. Cal. May 4, 2015); *see also Wolph*, 2013 WL 5718440, at \*2  
 4 (“Under California law, “[t]he primary method for establishing the amount of reasonable attorney  
 5 fees is the lodestar method.”) (citation omitted).

6 Furthermore, application of California’s lodestar method is appropriate in an injunctive  
 7 only 23(b)(2) settlement. “Where a class action settlement results in injunctive relief, the court  
 8 must ensure that the amount of the requested attorneys’ fees does not result in ‘less injunctive  
 9 relief for the class than could otherwise have been obtained.’” (citations omitted). *Goldkorn v. Cty.*  
 10 *of San Bernardino*, No. EDCV 06-707-VAP(OPx), 2012 U.S. Dist. LEXIS 17934, at \*25 (C.D.  
 11 Cal. Feb. 13, 2012). Here, the Settlement delivers as much injunctive relief as possible to the class  
 12 without providing a monetary award to the Class; thus, the Court applies the lodestar method to  
 13 determine whether the amount of attorneys’ fees is reasonable. *Id.*

14 Where, as here, the amount of the individual damages are relatively small the lodestar  
 15 method should be applied. *See Wren v. RGIS Inventory Specialists*, Case No. C-06-05778 JCS,  
 16 2011 WL 1230826, at \*16 (N.D. Cal. April 1, 2011). Because this consumer protection case  
 17 similarly involves small individual damages, the lodestar method should be applied.

18 **II. THE FEE AWARD OF \$195,000 IS REASONABLE AND IS LESS THAN THE**  
 19 **TIME SPENT BY CLASS COUNSEL REPRESENTING THE CLASS OVER THE**  
 20 **COURSE OF THE LITIGATION.**

21 As established above, the value of Class Counsel’s services to the class under California  
 22 law is calculated by multiplying the time reasonably spent on the litigation by appropriate hourly  
 23 rates. This calculation yields a lodestar value of at least \$252,975 through final approval of the  
 24 Settlement. Todzo Decl. at ¶¶32-33. This lodestar figure is “presumptively reasonable.” *Harman*  
 25 *v. San Francisco*, 69 Cal. Rptr. 3d 750, 759 (Cal. App. 1st Dist. 2007) (citation omitted). Indeed,  
 26 Class Counsel’s hours are thoroughly documented, the hours claimed are consistent with the  
 27 demands of this case, and significant billing judgment has been exercised. Nevertheless, Class  
 28 Counsel are only seeking to recover \$195,000 in attorneys’ fees, which is less than Class Counsel’s

1 lodestar.

2 **A. The More Than 425 Hours Class Counsel Expended Are Well Documented**  
 3 **and Reasonable in Light of the Case’s Complexity and Duration.**

4 Class Counsel are entitled to be compensated for all hours reasonably spent litigating this  
 5 case “absent facts rendering the award unjust.” *Serrano v. Unruh*, 652 P.2d 985 (Cal. 1982).  
 6 Time is reasonably spent if it is the type of work that would be billed to a paying client. *Harman*,  
 7 39 Cal. Rptr. 3d at 610. Moreover, “[i]t must . . . be kept in mind that lawyers are not likely to  
 8 spend unnecessary time on contingency fee cases in the hope of inflating their fees . . . . By and  
 9 large, the court should defer to the winning lawyer’s professional judgment as to how much time  
 10 he was required to spend on the case; after all, he won, and might not have, had he been more of a  
 11 slacker.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). “While extensive  
 12 detail about how an attorney or paralegal spends their time is not necessary, plaintiff’s counsel  
 13 should ‘identify the general subject matter of [their] time expenditures.’” *Lilly*, 2015 WL  
 14 2062858, at \*5 (citing *Lytle v. Carl*, 382 F.3d 978, 989 (9th Cir. 2004)).

15 Class Counsel maintained detailed contemporaneous time records, from which they have  
 16 prepared the summaries set forth in the Todzo Declaration. Todzo Decl. ¶¶15-16. Mr. Todzo’s  
 17 declaration provides a breakdown of the lodestar by timekeeper and a detailed summary of the  
 18 work performed from the inception of the litigation to the filing of the instant motion underlying  
 19 the reported time. *Id.* at ¶¶17-26. This evidence is “entitled to credence in the absence of a clear  
 20 indication the records are erroneous.” *Horsford v. Bd. Of Trustees Of California State U.*, 33 Cal.  
 21 Rptr. 3d 644, 673 (Cal. App. 5th Dist. 2005).

22 The time spent by Class Counsel was reasonable and necessary to bring this case to a  
 23 successful conclusion. The Todzo Declaration establishes that the work performed by Class  
 24 Counsel is the type of work that would ordinarily be billed to clients in non-contingent cases. *See*,  
 25 *e.g.*, Todzo Decl. at ¶¶17-24 and 33-35. Moreover, the work was necessary to provide appropriate  
 26 relief to Plaintiff and the Class. Furthermore, Class Counsel have exercised reasonable billing  
 27 judgment: any time that might be considered excessive, redundant or otherwise unnecessary has  
 28 not been claimed. *Id.* at ¶¶25-27

1           **B. Class Counsel’s Rates Are Consistent with the Predominate Market Rates for**  
2           **Private Lawyers in the Northern District.**

3           The hourly rates requested by Class Counsel are based on the rates charged by private  
4 attorneys of comparable skill, reputation and experience for similarly complex litigation in the  
5 Northern District. Todzo Decl. at ¶¶28-30. Declarations of the fee applicant’s attorney regarding  
6 prevailing fees in the community and rate determinations in other cases are satisfactory evidence  
7 of the prevailing market rate. *Minor v. Christie’s, Inc.*, C 08-05445 WHA, 2011 WL 902235, at  
8 \*4 (N.D. Cal. Jan. 29, 2011), *report and recommendation adopted* C 08-05445 WHA, 2011 WL  
9 902033 (N.D. Cal. Mar. 14, 2011). Moreover, counsel may claim their current hourly rates to  
10 account for the “deferred and contingent nature of counsel’s compensation.” *Miller v. Ghirardelli*  
11 *Chocolate Co.*, 12-CV-04936-LB, 2015 WL 758094, at \*6 (N.D. Cal. Feb. 20, 2015). Here, Class  
12 Counsel’s rates are fully justified.

13           Here, Plaintiff’s lead counsel, Mark N. Todzo, has over 25 years of experience in complex  
14 consumer protection and environmental public interest cases. Todzo Decl. ¶28. His \$800 hourly  
15 rate is well within the range of market rates charged by similarly experienced attorneys for  
16 reasonably comparable work. *Id.* at ¶¶27-28. Plaintiff’s other counsel were all similarly well  
17 qualified for the specific and defined roles they played. Their rates, ranging from \$325 to \$400,  
18 are comparable to market rates for similarly experienced attorneys. *Id.* ¶¶29-30. Given their  
19 expertise, experience and skill, Class Counsel’s hourly rates should be approved.

20           **C. The Requested Fee Award Is Reasonable Given the Benefits Obtained for the**  
21           **Class, the Serious Risks Assumed by Class Counsel and the Quality of the**  
22           **Representation.**

23           Plaintiff’s request for compensation for Class Counsel’s services in the amount of  
24 \$195,000 is eminently reasonable considering the relief obtained for the Class in the face of the  
25 risks undertaken by Class Counsel in representing the class on a contingency fee basis. While the  
26 lodestar figure is “presumptively reasonable,” a court applying California law may adjust it  
27 upward or downward by an appropriate positive or negative multiplier reflecting a host of factors  
28 including: (1) the degree of success; (2) the novelty and difficulty of the issues; (3) the risks

1 counsel assumed; and (4) the quality of the representation. *Chavez v. City of Los Angeles*, 224  
2 P.3d 41, 54 (Cal. 2010); *Graham*, 101 P.3d at 159.

3 Here, instead of seeking a positive multiplier, Class Counsel agreed to accept a negative  
4 multiplier in order to reach the Settlement with Defendant which secured excellent injunctive  
5 benefits for the class while avoiding the expense and risk entailed in continuing the litigation  
6 through trial.

7 **1. The Settlement Provides Full Injunctive Relief for the Class.**

8 The Settlement is a victory for the class because it cures the alleged misrepresentations that  
9 are at the heart of this case. Under the Settlement, class members will receive the benefit of a  
10 complete removal of the alleged misrepresentations without relinquishing any Class member's  
11 right to seek damages. Thus, the Settlement is an excellent result for class members.

12 **2. The Issues Involved in This Litigation Were Novel and Difficult.**

13 The issues raised in this case were novel and difficult. As discussed in Section I.A. above,  
14 this is one of the first cases of its kind. *Todzo Decl.* at ¶11. As a novel consumer class action,  
15 Class Counsel faced the reality that the litigation would likely be lengthy and hard-fought. The  
16 litigation risks included the fact that Defendant contends that the Products do not contain PFAS  
17 and, even if they do, not all PFAS prevent a product from being compostable. *Id.* For example,  
18 some PFAS are approved by the Food and Drug Administration ("FDA") via the FDA's Food  
19 Contact Notification process. It is Plaintiff's position that the FDA's Food Contact Notification  
20 does not address or relate to the compostability of a product, and thus is not relevant to the  
21 determination of whether the Products are compostable pursuant to the Guides for use of  
22 Environmental Marketing Claims published by the Federal Trade Commission (the "Green  
23 Guides"). Nonetheless, the FDA's approval of some PFAS could pose a litigation risk for  
24 Plaintiff. *Id.*

25 Second, there is presently no federal or state law that sets a standard level of PFAS in  
26 single-use foodware products or a specific standard for compostability of products containing  
27 PFAS. *Todzo Decl.* at ¶12. Accordingly, Plaintiff would have to borrow from private standards  
28 and a few municipal ones to prove his case. For example, a leading private certifier of



1 compostable products in the United States, Biodegradable Products, Inc. (“BPI”) recognizes that  
2 the presence of organo-fluorinated compounds equates to the presence of PFAS and, as a result,  
3 will not certify products as compostable unless those products contain no intentionally added  
4 fluorine and less than 100 ppm total fluorine.<sup>4</sup> As with BPI, the city of San Francisco has adopted  
5 a compostability standard that uses the same no intentionally added fluorine and 100 ppm total  
6 fluorine standard as a proxy for the presence of PFAS. *See* San Francisco Ordinance No. 201-18  
7 (File No. 180519). While private and municipal standards are helpful to Plaintiff, he would still  
8 be fashioning new law, which is always a risky proposition. *Id.*

9 As a result of the issues identified above, proving liability would be an expert intensive  
10 endeavor because the Court must determine: (1) the proper methodology for testing PFAS; (2)  
11 whether the Products contain PFAS when using the test methodology identified by the Court; (3)  
12 whether the presence of PFAS, which do not break down over time, precludes a product from  
13 being compostable; (4) whether PFAS in a product designed to be composted contaminates the  
14 compost stream with a toxin; and (5) whether FDA approval of a particular PFAS chemical used  
15 in a product provides a safe-harbor for that product from a finding that it poses the threat of toxic  
16 contamination to compost. *Todzo Decl.* at ¶13. Assuming that Plaintiff would be able to prove  
17 liability, he would then need to present evidence that the Products were sold at a premium due to  
18 the compostability claim. Plaintiff believes that he would be able to do so, but Defendant argues  
19 that there is no premium at all. Regardless, due to the expert intensive nature of proving both  
20 liability and monetary relief, such an undertaking poses a significant litigation risk for Plaintiff. *Id.*

21 **3. Class Counsel Faced Potential Risks in Taking the Case on a**  
22 **Contingency Basis.**

23 Class Counsel’s fee request is supported by the considerable risks they faced in  
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25 <sup>4</sup> Inorganic fluorine such as fluoride are fluorinated compounds that are not organic, i.e.,  
26 organo-fluorinated, and are thus not PFAS. The 100 ppm total fluorine standard accounts for and  
27 permits such compounds. It is much easier and less costly to test for total fluorine rather than  
28 organo-fluorinated compounds as Plaintiff’s lab did, which is why BPI uses the total fluorine  
standard.



1 undertaking the representation of the class in this case. A lodestar enhancement based on  
2 “contingent risk” is “intended to approximate market-level compensation for . . . services  
3 [rendered to fee-paying clients], which typically includes a premium for the risk of nonpayment or  
4 delay in payment of attorney fees.” *Ketchum v. Moses*, 17 P.3d 735, 746 (Cal. 2001); see  
5 *Graham*, 101 P.3d at 157 (“A lawyer who both bears the risk of not being paid and provides legal  
6 services is not receiving the fair market value of his work if he is paid only for the second of these  
7 functions.”). Here, the risk and uncertainty as to whether Plaintiff would prevail, and Class  
8 Counsel would ever be paid for their work warrants a fee enhancement.

9 The fee in this matter was entirely contingent with the only certainty being that there  
10 would be no fee without a successful result. Todzo Decl. at ¶14. Class Counsel have received no  
11 compensation for their efforts over the course of this litigation, and have advanced significant  
12 sums for litigation expenses. *Id.* Specifically, Class Counsel have risked non-payment of more  
13 than \$252,975 in out-of-pocket expenses and over 420 hours in attorney time expended on this  
14 matter, knowing that if their efforts were not successful no fee would be paid and they would not  
15 recoup their expenses. *Id.* at ¶¶14, 32-33.

16 Based on Class Counsel’s experience in other cases, litigating this case through class  
17 certification and up through trial would take an additional two years with an uncertain outcome.  
18 Todzo Decl. at ¶10. Nevertheless, Plaintiff has been able to achieve 100% success on his claim  
19 for injunctive relief now, while not limiting any other individual’s right to seek and recover  
20 monetary relief. Accordingly, the fee award should reflect the contingency risks.

#### 21 4. The Exceptional Quality of Class Counsel’s Representation.

22 Class Counsel were only able to prosecute this case so effectively and efficiently by virtue  
23 of their considerable experience in this area of the law. Class Counsel specialize in consumer  
24 class actions, and have served as counsel for classes of plaintiffs in a variety of substantive areas.  
25 Todzo Decl. at ¶15. In particular, Class Counsel have significant experience representing  
26 aggrieved consumers in class action cases alleging that consumer products were falsely advertised.  
27 The skill demonstrated by Class Counsel in litigating and ultimately settling this action supports  
28

1 the requested fee.

2 **III. THE CLASS REPRESENTATIVE SHOULD RECEIVE A REASONABLE**  
3 **SERVICE AWARD FOR HIS EFFORTS IN SECURING THE SETTLEMENT.**

4 Class Counsel request that the Court authorize incentive awards of \$5,000 for Plaintiff  
5 David Ambrose. Incentive awards are appropriate to compensate named plaintiffs for their work  
6 done in the interest of the class. *In re Cellphone Fee Termination Cases*, 113 Cal. Rptr. 3d 510,  
7 521-22 (Cal. App. 1st Dist. 2010). “In making the discretionary determination whether to grant  
8 such an award, the district court considers relevant factors including “the actions the plaintiff has  
9 taken to protect the interests of the class, the degree to which the class has benefitted from those  
10 actions, ... [and] the amount of time and effort the plaintiff expended in pursuing the litigation[.]”  
11 (citations omitted.)” *Chavez v. Converse, Inc.* (N.D. Cal., Nov. 25, 2020, No. 15-CV-03746-NC)  
12 2020 WL 10575028, at \*7. The effort of the class representative in this case was instrumental in  
13 achieving the Settlement on behalf of the class. Ambrose Decl. at ¶¶1-4. To date, the class  
14 representative has received no compensation whatsoever for his efforts. Todzo Decl. at ¶35. The  
15 requested service award is well deserved.

16 The amount of the requested service award is modest under the circumstances, and well in  
17 line with awards approved by courts in this District. In the Northern District, a “\$5,000 payment  
18 [to class representatives] is presumptively reasonable.” *Pierce v. Rosetta Stone, Ltd.*, No. 11-  
19 01283 SBA, 2013 WL 5402120, at \*6 (N.D. Cal. Sept. 26, 2013). The service award here is  
20 warranted considering the class representative’s substantial efforts in obtaining excellent relief for  
21 the class.

22 Since Plaintiff Ambrose filed the initial complaint he has performed a number of tasks that  
23 greatly assisted in the preparation, prosecution and settlement of the case. Among other things,  
24 Plaintiff (1) consulted with Class Counsel on a regular basis throughout the case; (2) attended a  
25 full-day mediation; (3) provided factual background to assist in the development of the case and in  
26 responding to a round of discovery requests; (4) reviewed pleadings and correspondence in the  
27 case; and (5) evaluated and approved the Settlement papers. *See* Ambrose Decl. at ¶¶1-4. Thus,  
28 the \$5,000 award to Plaintiff is justified by the significant time he spent protecting the interests of

1 the class over the course of the litigation.

2 **CONCLUSION**

3 For the foregoing reasons, the Court should award Class Counsel \$195,000 in attorneys'  
4 fees and should authorize a service award of \$5,000 for Plaintiff Ambrose.

5  
6 DATED: September 16, 2021

Respectfully submitted,

7 LEXINGTON LAW GROUP

8  
9 By: /s/ Mark N. Todzo

Mark N. Todzo

10 Attorneys for Plaintiff DAVID AMBROSE, on  
11 Behalf of Himself and All Others Similarly  
12 Situated

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