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13 UNITED STATES DISTRICT COURT  
 14 CENTRAL DISTRICT OF CALIFORNIA  
 15

16 IMANI WHITFIELD, SHAWANNA  
 17 McCOY, and JOSEY PARSONS  
 18 AUGHTMAN, on behalf of themselves  
 19 and all others similarly situated,

20 Plaintiffs,

21 v.

22 YES TO, INC.,

23 Defendant  
 24  
 25  
 26  
 27  
 28

Case No. 2:20-cv-00763-AB-AS

**PLAINTIFFS' NOTICE OF  
 MOTION AND MOTION FOR  
 PRELIMINARY APPROVAL OF  
 CLASS ACTION SETTLEMENT,  
 PROVISIONAL  
 CERTIFICATION OF  
 NATIONWIDE SETTLEMENT  
 CLASS, AND APPROVAL OF  
 PROCEDURE FOR AND FORM  
 OF NOTICE**

Date: February 26, 2021  
 Time: 10:00 a.m.  
 Courtroom 7B

Hon. André Birotte, Jr.

**NOTICE OF MOTION AND MOTION**

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

**PLEASE TAKE NOTICE THAT** on February 26, 2021 at 10:00 a.m., or as soon thereafter as the matter may be heard by the above-captioned Court, located at the 350 West First Street, Los Angeles, CA 90012, courtroom 7B, in the courtroom of the Honorable André Birotte, Jr., Plaintiffs Imani Whitfield, Shawanna McCoy, and Josey Parsons Aughtman will and hereby do move, pursuant to Fed. R. Civ. P. 23(e), for the Court to:

- (i) grant preliminary approval of the proposed Stipulation of Settlement,
- (ii) provisionally certify the Settlement Class<sup>1</sup> for the purposes of preliminary approval, designate them as the Class Representatives, and appoint undersigned counsel as Class Counsel for the Settlement Class,
- (iii) approve the appointment of Heffler Claims Group as the Settlement Administrator,
- (iv) establish procedures for giving notice to members of the Settlement Class,
- (iv) approve forms of notice to Settlement Class Members,
- (v) mandate procedures and deadlines for exclusion requests and objections, and
- (vi) set a date, time, and place for a final approval hearing.

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

This motion is based on the attached Memorandum of Points and Authorities, the accompanying Declarations of Gillian L. Wade and Jeanne C. Finegan, APR, the

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<sup>1</sup> All capitalized terms herein that are not otherwise defined have the definitions set forth in the Stipulation of Settlement, filed concurrently herewith. *See* Wade Decl. Ex. 1.

1 pleadings and papers on file herein, and any other written and oral arguments that may  
2 be presented to the Court.

3 Dated: January 28, 2021

**MILSTEIN, JACKSON, FAIRCHILD,  
& WADE, LLP**

4  
5 By: /s/ Gillian L. Wade  
Gillian L. Wade

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*Class Counsel*

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1 **I. INTRODUCTION**

2 This is a consumer class action concerning Yes To's ("Defendant") "grapefruit  
3 Vitamin C-Boosting Unicorn Paper Mask" (the "Product" or "Mask"), which was  
4 available at big-box retailers and pharmacies throughout California and the United  
5 States. Defendant marketed the Mask to young women and girls as being able to remedy  
6 "dull & uneven skin" and as capable of "help[ing] reveal a bright, glowing, naturally  
7 more even-looking complexion. Your skin will look great in selfies with this mask on  
8 AND off!" But contrary to these claims, the Mask caused Plaintiffs and other consumers  
9 to suffer from facial skin irritation, redness, and burning after using the Mask.  
10 Following a flood of complaints, Defendant commenced a voluntary 'recall' of the  
11 Mask and stopped further distribution of the Product, though some could still be found  
12 on some store shelves and websites through at least the end of 2020. After obtaining  
13 relevant documents and information related to the Product and its sales, Defendant and  
14 Plaintiffs Imani Whitfield, Shawanna McCoy, and Josey Parsons-Aughtman  
15 ("Plaintiffs"), through undersigned counsel, negotiated a fair, reasonable, and adequate  
16 class settlement with the help of a neutral mediator, Jill Sperber of Judicate West.

17 There can be no doubt the Settlement was reached in a procedurally fair manner  
18 given the settlement negotiations were conducted at arms-length by experienced  
19 attorneys familiar with the legal and factual issues of this case. With respect to the  
20 substance of the proposed settlement, Rule 23(e)(2)'s relatively recently-added  
21 requirements and the Ninth Circuit's factors for evaluating the fairness of a settlement  
22 both weigh heavily in favor of preliminary approval.

23 The proposed Settlement consists solely of monetary relief. Specifically, in  
24 exchange for a nationwide release of claims, Defendant will make a non-reversionary  
25 \$750,000 cash payment for the benefit of the Class. If approved, this money will be  
26 used to pay for the following, in this order: Notice and Other Administrative Costs; the  
27 Fee and Expense Award; and, Incentive Awards; and, cash payments to Settlement  
28

1 Class Members who submit eligible claims without requiring proof of purchase.<sup>2</sup>

2 With regard to the per-claim amount, the Agreement provides that Settlement  
3 Class Members who submit valid claims may recover a reimbursement of \$3.00 for  
4 each Mask he or she purchased or used, up to a maximum of six (6) Masks. Claims will  
5 be paid without requiring proof of purchase. If the amount of cash available for the  
6 Settlement Fund is insufficient to pay all valid Settlement Class Member Claims (after  
7 payment of any approved Fee and Expense Award, Notice and Other Administrative  
8 Costs, and Incentive Awards), individual payment amounts for Claims shall be reduced  
9 on a *pro-rata* basis. Similarly, if the total valid Settlement Class Member Claims is less  
10 than the available portion of the Settlement Fund, the cash payout for each class member  
11 will increase *pro rata*.

12 This structure will ensure no funds revert back to Defendant. A recovery for up  
13 to six Masks without proof of purchase reaches or exceeds the maximum recovery  
14 Plaintiffs, or any class member, could expect at trial. Indeed, Plaintiffs have achieved a  
15 nearly a complete refund for all sales of the Mask, as approximate aggregate sales for  
16 the Mask are almost \$735,000. Moreover, the estimated class size is relatively small  
17 because it was available for a limited duration given Defendant quickly began the  
18 process of removing the Mask from stores shelves and ceasing distribution once it  
19 became aware of some consumers' adverse reactions to the Mask.

20 The proposed Settlement Class meets every element of Rule 23(a) and (b)(3) for  
21 settlement purposes. Provisional certification of the Settlement Class is proper because  
22 the packaging for the Mask is the same nationwide, and Defendant's conduct emanated  
23 from California, as its headquarters are in Pasadena.

24 For the reasons explained below, pursuant to Rule 23 of the Federal Rules of  
25 Procedure, this Court should enter an order preliminarily approving the settlement,

26 \_\_\_\_\_  
27 <sup>2</sup> Unless otherwise specified, all capitalized terms have the same meanings as ascribed  
28 in the Stipulation of Settlement (the "Agreement"), which is attached as Exhibit 1 to  
the Declaration of Gillian L. Wade, filed concurrently herewith in support of this  
Motion. References to "Ex. \_\_\_" refer to exhibits attached to the Agreement.

1 provisionally certifying the settlement Class, directing notice of the settlement to the  
2 Class in the manner proposed herein, and setting a schedule for final approval.

## 3 **II. FACTUAL BACKGROUND**

### 4 **A. Summary of Allegations and Defenses**

5 Yes To marketed the Mask for remediation of “dull & uneven skin” and  
6 advertised that “[t]his mask will make your skin care fantasies come true, as it helps  
7 reveal a bright, glowing, naturally more even-looking complexion.” Dkt. No. 23  
8 (Consolidated Amended Complaint (“CCAC”)), ¶ 23. Defendant also claimed: “Your  
9 skin will look great in selfies with this mask on AND off!” *Id.* But contrary to these  
10 claims, the Mask—which was marketed to target young women and girls—did the  
11 opposite. *Id.* Specifically, when the Mask was purchased and subsequently used by  
12 unsuspecting customers in accordance with Yes To’s instructions for use, it resulted in  
13 adverse reactions including severe facial skin irritation, redness, burning, blistering,  
14 swelling and pain. *Id.* ¶3. Each of the Plaintiffs experienced severe skin irritation and  
15 burning after using the Mask. *Id.* ¶¶48-55.

16 Defendant’s main defenses pertain to its conduct after consumers began  
17 complaining about the mask: Defendant purportedly initiated the process of halting  
18 distribution of the Mask and pulling the Mask from store shelves. *Id.* ¶¶38-44 For  
19 example, Defendant’s webpage for the Mask has sporadically stated that the product  
20 had been “discontinued” due to “reports of skin irritation,” and advised purchasers to  
21 return the Product or call Yes To directly if it had been used. *Id.*

22 Based on the data that Defendant provided, approximately 243,000 units were  
23 sold at retail, and the approximate revenue for the Mask was nearly \$735,000. Wade  
24 ISO Preliminary Approval (“Wade Dec.”), ¶18. Based on Class Counsel’s research, the  
25 Mask retailed for less than \$4 per unit. *Id.*

### 26 **B. The Litigation**

27 On January 24, 2020, Plaintiff Imani Whitfield commenced an action entitled  
28 *Whitfield v. Yes To, Inc.* (United States District Court, Central District of California,

1 Case No. 2:20-cv-763) (the “Action”), as a proposed class action, asserting claims for  
2 breach of express warranty, breach of implied warranty, violation of Pennsylvania’s  
3 Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1, *et seq.*  
4 (“UTPCPL”), fraudulent concealment, fraud, unjust enrichment, and conversion.  
5 Plaintiff Whitfield alleged the Mask caused skin irritation and/or burns to her face.

6 On February 6, 2020, Josey Parsons- Aughtman commenced an action entitled  
7 *Aughtman v. Yes To, Inc.* (United States District Court, Central District of California,  
8 Case No 2:20-cv-01223), as a proposed class action, asserting similar allegations about  
9 the Mask causing her to suffer burns and irritation on her face as a result of using the  
10 Mask. The *Aughtman* action alleged claims for Violations of Consumer Legal Remedies  
11 Act (CLRA), Violations of False Advertising Law (FAL), Violations of Unfair  
12 Competition Law (UCL) ‘Unfair’ and ‘Fraudulent’ Prongs, Violations of Unfair  
13 Competition Law (UCL) ‘Unlawful’ Prong, Breach of Implied Warranty of  
14 Merchantability, and Breach of Implied Warranty of Fitness for a Particular Purpose.

15 On February 19, 2020, Plaintiffs Imani Whitfield and Shawanna McCoy filed a  
16 First Amended Complaint asserting the same allegations that the Mask caused facial  
17 irritation and/or burns, and advanced the same claims, adding additional causes of  
18 action for violation of CLRA, UCL, and FAL. Dkt. No. 9.

19 On March 20, 2020, Plaintiffs Imani Whitfield and Shawanna McCoy filed a  
20 Second Amended Complaint asserting the same claims and adding a prayer for damages  
21 for the CLRA claim. Dkt. No. 20.

22 On March 17, 2020, the *Whitfield* action was consolidated with the related  
23 *Aughtman* action. Dkt. No. 19. On May 15, 2020, Plaintiffs Imani Whitfield, Shawanna  
24 McCoy, and Josey Parsons Aughtman filed the CCAC, asserting the same claims for  
25 relief as in the FAC and SAC. Dkt No. 23.

26 Defendant answered the CCAC on June 12, 2020, denying liability. Dkt. No. 25.  
27 Plaintiffs then propounded formal requests for production of documents.

28 On September 4, 2020, the Parties filed their Joint Report Rule 26(f) Discovery

1 Plan. Dkt. No. 30. This was followed shortly on September 10, 2020 by the Court  
2 ordering the case to a private mediator. Dkt. No. 32. The same day, the Court released  
3 a scheduling order for the upcoming trial. Dkt. No. 33.

#### 4 **C. Settlement Negotiations**

5 Substantial settlement negotiations took place between the Parties. In addition to  
6 informal settlement discussions, on November 11, 2020, the Parties remotely attended  
7 a video mediation with Jill Sperber Esq. of Judicate West. Declaration of Gillian L.  
8 Wade Dec., ¶6; Declaration of Yitzcha Kopelk ISO Preliminary Approval (“Kopel  
9 Decl.”), ¶8. After a full day of hard-fought negotiations at mediation, the Parties were  
10 able to reach a resolution. *Id.* All settlement discussions were at arms-length. *Id.* On  
11 December 14, Plaintiffs filed a notice of Settlement with the court. Dkt. No. 34.

### 12 **III. TERMS OF THE SETTLEMENT**

#### 13 **A. The Settlement Class Definition**

14 For purposes of the Settlement only, Plaintiffs respectfully request certification  
15 of the following Settlement Class:

16 All persons in the United States who purchased or used the Yes To  
17 Grapefruit Vitamin C Glow-Boosting Unicorn Paper Mask.

18 Agreement §1.20. Excluded from this definition are the Released Persons, any person  
19 or entity that purchased the Yes To Grapefruit Vitamin C Glow-Boosting Unicorn Paper  
20 Mask for purposes of resale and not for his/her/its own consumption (i.e., “Resellers”),  
21 and any judicial officer assigned to this case. *Id.*

#### 22 **B. Benefits to Class Members**

23 Yes To will make a total cash payment of \$750,000. Agreement §2.1. Money  
24 from the cash payment (the “Settlement Fund”) will be used to pay the following, in  
25 this order: (1) the costs to give notice of the settlement and administer claims; (2)  
26 reasonable attorneys’ fees, costs, and expenses approved by the Court; (3) any Court-  
27 approved service awards to Plaintiffs; and (4) eligible claims by Settlement Class  
28 Members. *Id.* §§1.21, 2.3.

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**1. Reimbursement for Masks Purchased**

Settlement Class Members who submit valid claims may recover \$3.00 for each Mask he or she purchased or used, up to a maximum of six (6) Masks. Agreement at §2.4(a); Ex. A (Claim Form); Ex. B (Long Form Notice); Ex. E (Short Form Notice). Claims will be paid without requiring proof of purchase, though claimants must provide attestation to the purchase(s) or use under penalty of perjury. *Id.*, §2.5.

If the amount of cash available for the Settlement Fund is insufficient to pay all valid Settlement Class Member Claims (after payment of the Fee and Expense Award, Notice and Other Administrative Costs, and the Incentive Award), individual payment amounts for Claims shall be reduced on a pro-rata basis. *Id.*, §2.4(a). Similarly, receipt of total valid Settlement Class Member Claims less than the available portion of the Settlement Fund will increase the cash payout for each class member on a pro rata basis. *Id.*, §2.7. *See also id.*, §2.3(d).

If any unpaid funds from uncleared settlement checks remain in the Settlement Fund, Class Counsel will make an application to the Court to seek approval for a proposed disposition of the unpaid funds from uncleared checks. *Id.*, §2.8. The unpaid funds will remain in the Settlement Fund pending further order of the Court. *Id.*

**2. Payment of Incentive Awards and Attorneys' Fees and Costs**

Class Counsel will seek service awards of \$5,000 each for Plaintiffs Whitfield, McCoy, and Aughtman. *Id.*, ¶2.3(c). The Incentive Awards (\$15,000 total) will compensate Plaintiffs for their time and effort in the case, and for the risks they undertook in prosecuting the Action. *Id.*

The Settlement also permits Class Counsel to file a motion requesting attorneys' fees of up to one-third of the Settlement Fund (\$250,000) plus litigation expenses (estimated to be \$5,483.14). *Id.*, §3.1; Wade Dec., ¶¶7, 8; Kopel Dec., ¶12. As will be fully briefed in Class Counsel's forthcoming application for attorneys' fees and costs,

1 necessary costs were incurred, including filing fees and the cost of mediation. *Id.*<sup>3</sup>

2 **3. The Notice Program and Settlement Administration**

3 **a. The Cost of Notice and Administration; Heffler’s Duties**

4 The parties selected Heffler Claims Group (“Heffler”) as the Settlement  
5 Administrator. *Id.*, §1.19.<sup>4</sup> Heffler will be responsible for administering administrative  
6 tasks necessary to implement the terms of the Agreement, including (a) notifying the  
7 appropriate state and federal officials about the settlement, (b) arranging for distribution  
8 of Class Notice (in the form approved by the Court) and Claim Forms (in a form ordered  
9 by the Court) to Settlement Class Members, (c) handling inquiries from Settlement  
10 Class Members and/or forwarding such written inquiries to Class Counsel and  
11 Defendant’s Counsel, (d) receiving and maintaining on behalf of the Court and the  
12 Parties any Settlement Class Member correspondence regarding requests for exclusion  
13 from the settlement, (e) establishing the Settlement Website that posts notices, Claim  
14 Forms and other related documents, (f) receiving and processing claims and distributing  
15 payments to Settlement Class Members, and (g) otherwise assisting with  
16 implementation and administration of the Stipulation terms. *Id.*, §4.5.

17 The actual costs incurred by the Settlement Administrator for effectuating Class  
18 Notice and other administrative costs for administering the Settlement will be paid from  
19 the Settlement Fund. Agreement §2.3(a). Heffler estimates that the cost of notice and  
20 administration will be approximately \$173,000, depending on the number of claims  
21 made. Finegan Dec., ¶15.

22 **b. The Proposed Class Notice**

23 The Class Notice shall consist of (1) digital advertisements (banner ads) to be  
24 distributed over desktop and mobile devices, via such websites as Google Ads,  
25

26 <sup>3</sup> This application will be filed no later than 21 days before the deadline for Class  
Members to object or opt out. Ex. C, ¶27.

27 <sup>4</sup> Heffler’s significant experience and qualifications are described in Declaration of  
28 Jeanne C. Finegan, APR Concerning Class Notification, filed concurrently herewith  
(the “Finegan Dec.”) at ¶¶5-12, Ex. A.

1 Facebook, Instagram, TikTok and through social influencers with beauty and personal  
 2 care content whose followers are target customers of the Mask; (2) a press release issued  
 3 through PR Newswire’s US1 Newlines; (3) a dedicated website allowing Settlement  
 4 Class Members to obtain additional information and access key documents, including  
 5 the Long Form Notice (Ex. B), the Claim Form, the Agreement, and the Preliminary  
 6 Approval Order. *See* Finegan. Dec., ¶14.<sup>5</sup>

7 Additionally, to fulfill the CLRA’s publication requirement, the Short Form  
 8 Notice will also appear as 1/8 page notices once a week for four consecutive weeks in  
 9 Orange County Register, which boasts an average daily circulation of approximately  
 10 81,350. *Id.*, ¶24; see also Cal. Civ. C. 1781(d).<sup>6</sup> Heffler will also give notice to the  
 11 appropriate federal and state officials, as required by the Class Action Fairness Act of  
 12 2005 (CAFA). *See* CAFA, 28 U.S.C. §1715(b)(1)-(8).

13 Class Members will have at least 120 days from the last day of the Notice Date  
 14 to object, make a claim, or opt-out. *See* Ex. C, ¶¶17, 21, 24. Class Members will be  
 15 able to complete the Claim Form (Ex. A) and submit it online on the Settlement  
 16 Website, or request that a paper copy be mailed so it can be completed and mailed to  
 17 Heffler’s designated P.O. Box. Finegan Dec. at ¶¶31, 32; Agreement, Exs. A, B.

#### 18 **IV. THE LEGAL STANDARD FOR PRELIMINARY APPROVAL**

##### 19 **1. The Class Action Settlement Process**

20 The Ninth Circuit maintains “a strong judicial policy” favoring class action  
 21 settlements. *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, 2019 U.S.  
 22 App. LEXIS 17047, at \*14 (9th Cir. 2019) (quoting *Allen v. Bedolla*, 787 F.3d 1218,  
 23 1223 (9th Cir. 2013)); *see also Class Plaintiffs v. City of Seattle*, 955 F.3d 1268, 1276

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 25 <sup>5</sup> Heffler and the Parties are working on the internet ads and content of the press  
 release; they will be submitted to the Court sufficiently in advance of the hearing.

26 <sup>6</sup> Though Civil Code section 1781 does not appear to govern nationwide consumer  
 class actions, it is being provided in an abundance of caution. *See Choi v. Mario*  
 27 *Bodusco Skin Care, Inc.*, 248 Cal. App. 4th 292 (2016) (affirming final approval and  
 rejecting objector’s contention notice failed to comport with the Cal. Civ. 1781(d)).  
 28



1 (9th Cir. 1992) (noting the “strong judicial policy that favors settlements, particularly  
2 where complex class action litigation is concerned”). Nevertheless, a decision “to  
3 approve or reject a settlement is committed to the sound discretion of the trial judge  
4 because he is exposed to the litigants, and their strategies, positions, and proof.” *In re*  
5 *Mego Fin. Corp.*, 213 F. 3d 454, 458 (9th Cir. 2000); Fed. R. Civ. P. 23(e).

6 Approval is a three-step process: (1) preliminary approval of the proposed  
7 settlement; (2) dissemination of the notice of the settlement to class members, providing  
8 for, among other things, a period for potential objectors and dissenters to raise  
9 challenges to the settlement’s reasonableness; and (3) a formal fairness and final  
10 settlement approval hearing. *Manual for Complex Litigation (Fourth)* (2004) (the  
11 “Manual”) at § 21.63; *see, e.g. Churchill Vill., L.L.C. v. GE*, 361 F. 3d 566, 575 (9th  
12 Cir. 2004) (discussing the district court’s use of a preliminary approval order).

## 13 **2. The Standard for Preliminary Approval**

14 The Court’s role in evaluating the proposed settlement “must be limited to the  
15 extent necessary to reach a reasoned judgment that the agreement is not the product of  
16 fraud or overreaching by, or collusion between, the negotiating parties, and that the  
17 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”  
18 *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). The Court takes a  
19 “closer look” at the ultimate question of fairness, reasonableness and adequacy of the  
20 settlement at final approval. *Id.*

21 At this stage, therefore, a court may grant preliminary approval and direct notice  
22 to the class if the settlement: “(1) appears to be the product of serious, informed, non-  
23 collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant  
24 preferential treatment to class representatives or segments of the class; and (4) falls  
25 within the range of possible approval.” *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312,  
26 319 (C.D. Cal. 2016)); *see also Aikins v. Cisneros*, 2019 U.S. Dist. LEXIS 131939, \*18  
27 (C.D. Cal. Jul. 31, 2019) (granting preliminary approval); *Ahmed v. HSBC Bank USA*,  
28 2019 U.S. Dist. LEXIS 104401, \*12 (C.D. June 21, 2019) (same). Whether a settlement

1 is fair, adequate, and reasonable is considered as a whole. *Hanlon v. Chrysler Corp.*,  
2 150 F.3d 1011, 1026 (9th Cir. 1998). Thus, to preliminarily assess a settlement, a court  
3 should review both the substance of the deal and the process used to arrive at the  
4 settlement. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080 (“Preliminary  
5 approval . . . has a both procedural and substantive requirement”). A “full fairness  
6 analysis is unnecessary” at preliminary approval. *Aikins*, 2019 U.S. Dist. LEXIS  
7 131939, \*17.

8 In preliminarily evaluating the adequacy of a proposed settlement, particular  
9 attention should be paid to the process of settlement negotiations. *See, e.g., Vind v.*  
10 *Prudential Ins. Co. of Am.*, 2011 WL 13183043, at \*1 (C.D. Cal. Jan. 10, 2011) (noting  
11 that the “parties engaged in arm's length settlement negotiations taking place over a  
12 period of months before reaching the proposed settlement” in granting preliminary  
13 settlement approval). Here, the negotiations were conducted by experienced class action  
14 counsel, with significant involvement by mediator Jill Sperber. Thus, counsel’s  
15 assessment and judgment are entitled to a presumption of reasonableness, and the court  
16 is entitled to rely heavily upon their opinion. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610,  
17 622-23 (N.D. Cal. 1979).

18 Accordingly, the substantive quality of the Agreement and the procedurally fair  
19 manner in which it was reached weigh in favor of approval.

20 **V. THE PROPOSED SETTLEMENT IS FAIR, ADEQUATE, AND**  
21 **REASONABLE**

22 **1. Procedural Concerns.**

23 **a. The Settlement Was Negotiated at Arms’ Length.**

24 The Ninth Circuit “put[s] a good deal of stock in the product of an arm’s-length,  
25 non-collusive, negotiated resolution” in approving a class action settlement. *Rodriguez*,  
26 563 F.3d at 965. Protracted settlement negotiations with the assistance of a mediator  
27 also weigh highly in favor of granting preliminary approval. *See In re Bluetooth*  
28

1 *Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (“presence of a neutral  
2 mediator [is] a factor weighing in favor of a finding of non-collusiveness”).

3 Here, Class Counsel obtained and reviewed relevant information provided by  
4 Defendant about the sales of the Product. On November 11, 2020, the parties engaged  
5 in a full-day mediation with Ms. Sperber. Wade Decl. at ¶¶6, 18-20; Kopel Dec., ¶¶8,  
6 9-11. It is an understatement to say that the parties benefited from the assistance of Ms.  
7 Sperber, who played a crucial role in conducting the negotiations.

## 8 **2. Substantive Concerns.**

9 Relatively recent amendments to Rule 23 direct courts to consider the following  
10 “substantive” factors: (i) the costs, risks, and delay of trial and appeal; (ii) the  
11 effectiveness of any proposed method of distributing relief to the class, including the  
12 method of processing class-member claims; (iii) the terms of any proposed award of  
13 attorney’s fees, including timing of payment; and (iv) any agreement required to be  
14 identified under Rule 23(e)(3). Fed R. Civ. P. 23(e)(2)(C). Courts must also consider  
15 whether “the proposal treats class members equitably relative to each other.” Fed. R.  
16 Civ. P. 23(e)(2)(D).

17 Courts should also apply “the framework set forth in Rule 23, while continuing  
18 to draw guidance from the Ninth Circuit’s factors and relevant precedent.” *Hefler v.*  
19 *Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 U.S. Dist. LEXIS 213045, at \*13 (N.D.  
20 Cal. Dec. 17, 2018).<sup>7</sup> A district court “may consider some or all of the following factors”  
21 when assessing whether a class action settlement is fair, reasonable and adequate: (1)  
22 strength of the plaintiffs’ case; (2) risk, expense, complexity, and likely duration of  
23 further litigation; (3) risk of maintaining class action status throughout trial; (4) the  
24 amount offered in settlement; (5) extent of discovery completed and the stage of  
25 proceedings; (6) the experience and views of counsel; (7) presence of a government

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27 <sup>7</sup> In the notes accompanying these amendments, the Advisory Committee explains that  
28 adding these specific factors to Rule 23(e)(2) was not designed “to displace any factor,  
but rather to focus the court and the lawyers on the core concerns of procedure and  
substance that should guide the decision whether to approve the proposal.” *Id.*

1 participant; and (8) reaction of the class members to the settlement. *See Rodriguez v.*  
 2 *W. Publ'g Corp.*, 563 F. 3d 948, 963 (9th Cir. 2009) (citing *Molski v. Gleich*, 318 F.3d  
 3 937, 953 (9th Cir. 2003), *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003),  
 4 *Hanlon*, 150 F.3d at 1026,<sup>8</sup> *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575  
 5 (9th Cir. 2004). “The relative degree of importance to be attached to any particular  
 6 factor will depend upon and be dictated by the nature of the claim(s) advanced, the  
 7 type(s) of relief sought, and the unique facts and circumstances presented by each  
 8 individual case.” *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688  
 9 F.2d 615, 625 (9th Cir. 1982).

10 As set forth below, the settlement is well within the range of what the Court might  
 11 finally approve.

12 **a. The Settlement Satisfies Rule 23(e)(2)**

13 **i. Strength of Plaintiffs' Case and Risk of Continuing**  
 14 **Litigation**

15 Consistent with Rule 23's instruction to consider “the costs, risks, and delay of  
 16 trial and appeal,” Fed. R. Civ. P. 23(e)(2)(C)(i), courts in this Circuit evaluate “the  
 17 strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of  
 18 further litigation; [and] the risk of maintaining class action status throughout the trial,”  
 19 *Hanlon*, 150 F. 3d at 1026. Generally, the principal risks to be assessed are the  
 20 difficulties and complexities of proving liability and damages. *See, e.g., Mego*, 213 F.  
 21 3d at 458-59; *Torrisi v. Tuscon Electric Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993)  
 22 (approving settlement based on uncertainty of claims and avoidance of summary  
 23 judgment); *Officers for*, 688 F.2d at 625 (approving settlement based in part on  
 24 possibility judgment after trial, when discounted, might not reward members for their  
 25 patience and delay). Where counsel are well-qualified to represent the class in a

26 \_\_\_\_\_  
 27 <sup>8</sup> In *Hanlon*, the Ninth Circuit also instructed district courts to consider “the reaction  
 28 of the class members to the proposed settlement.” *Hanlon*, 150 F.3d at 1026. This  
 consideration is more germane to final approval, and will be addressed at the  
 appropriate time.

1 settlement based on their class action experience and familiarity with the strengths and  
2 weaknesses of the action, “[c]ounsel’s opinion is accorded considerable weight.”  
3 *Carter v. Anderson Merchandisers, LP*, No. EDCV 07-0025-VAP, 2010 U.S. Dist.  
4 LEXIS 55629, at \*8 (C.D. Cal. May 11, 2010)). *See also Louie v. Kaiser Found. Health*  
5 *Plan, Inc.*, No. 08-cv-0795, 2008 U.S. Dist. LEXIS 78314, at \*6 (S.D. Cal. Oct. 6,  
6 2008) (“counsel’s extensive investigation, discovery, and research weighs in favor of  
7 preliminary settlement approval”).

8 In considering whether to enter into the Settlement, Plaintiffs, represented by  
9 counsel experienced in class actions involving false advertising and consumer fraud,  
10 weighed the risks inherent in establishing all the elements of their claims at trial. Wade  
11 Decl. at ¶¶18-20; Kopel Dec., ¶¶9-11. They also considered the expense of retaining  
12 experts, giving class notice if they were successful in certifying a class, and a trial (and  
13 likely duration of post-trial motions and appeals). Plaintiffs agreed to settle this  
14 litigation on these terms based on their careful investigation and evaluation of the facts  
15 and law relating to Plaintiffs’ allegations and Yes To’s defenses (including the Product  
16 recall and cessation of distribution). *Id.*

17 **ii. The Method for Distributing Monetary Relief is**  
18 **Effective and Efficient.**

19 The Court must consider “the effectiveness of [the] proposed method of  
20 distributing relief to the class.” Fed. R. Civ. P. 23(e)(2)(C)(ii). As explained by the  
21 2018 Advisory Committee Notes to Rule 23, a “claims processing method should deter  
22 or defeat unjustified claims, but the court should be alert to whether the claims process  
23 is unduly demanding.”

24 The proposed method of processing claims here strikes that delicate balance.  
25 Settlement Class Members who seek monetary relief under the Settlement need only  
26 submit a relatively simple claim form. Ex. A. The one-page Claim Form only requires  
27 Settlement Class Members to provide their contact information and basic information  
28 about their Mask purchases, without proof of purchase. *Id.* Thus, the Claim Form is

1 clear, precise and simple for Settlement Class Members to complete.

2 Settlement Class Members will have the option of making claims online or by  
3 printing the Claim Form and mailing it to the Settlement Administrator. Ex. B at ¶7.  
4 Payments to Class Members who submitted valid Claim Forms will be disbursed  
5 directly to eligible claimants. This procedure is claimant-friendly, efficient, cost-  
6 effective, proportional and reasonable.

7 **iii. The Proposed Attorneys' Fees are Fair.**

8 The Agreement provides that Class Counsel may apply for an award of  
9 attorneys' fees of no more than 33% of the Settlement Fund (\$250,000). Agreement  
10 §3.1. *See, e.g., Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 448-455  
11 (E.D. Cal. 2013) (awarding fees equal to one-third of the common fund in class action  
12 settlement and collecting cases). The Agreement also provides that Class Counsel may  
13 apply for an award of litigation expenses, which are estimated to be \$5,483.14.  
14 Agreement §3.1; Wade Dec., ¶¶7-8; Kopel Dec., ¶12. Such requests have frequently  
15 been granted in class actions in this Circuit. Class Members, and the Court, will have  
16 an opportunity to review the application for an award of fees and expenses request.

17 The timing for payment of the Fee and Expense Award under the Agreement, if  
18 approved, is fair and reasonable. Specifically, such fees, costs, and expenses, if  
19 approved by the Court, will be paid within 30 days following the District Court's fee  
20 award, which under no circumstances will be prior to the Settlement Approval order  
21 and Final Judgment. *Id.* §3.1. The payment is also subject to Class Counsel executing  
22 the Undertaking Regarding Attorneys' Fees and Costs (Ex. F). Moreover, if the Final  
23 Approval Order and Final Judgment or any part of it is vacated, overturned, reversed,  
24 or rendered void or unenforceable as a result of an appeal, or if the Stipulation is  
25 terminated for any reason, Class Counsel must repay the full amount of the Fee and  
26 Expense Award. *Id.* Accordingly, Class Counsel will only get paid if the Settlement is  
27 fully finalized, which is fair to the Settlement Class.

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**iv. There Are No Supplemental Agreements to be Identified Under Rule 23(e)(3).**

Rule 23(e) requires that the parties identify “any agreement made in connection with the proposal.” Fed. R. Civ. P. 23(e)(3). The only agreement made in connection with the proposed Settlement is the Stipulation of Settlement, which is being concurrently filed, and has been summarized in section III above.

**v. Class Members Are Treated Equally.**

The 2018 Advisory Committee Notes to Rule 23 explain that this factor concerns “inequitable treatment of some class members vis-à-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.” *Id.* None of those concerns are present here.

Each member of the Class is treated in the same manner with respect to the claims they are releasing (those “relating in any way to the purchase or use” of the Mask, including the “allegations made in the Action”) and their eligibility for an award. Under the Agreement, each Class Member can submit a claim for \$3 per mask, regardless of the amount actually paid and without providing any proof of purchase. Agreement §2.4(a), §2.5, §6.1. Claims may increase or decrease *pro rata*, which will ensure all Settlement Class Members are treated equally if there is insufficient or an overage of Settlement Funds after the other expenses are paid. *Id.*, §2.4(a), §2.7. Overall, this approach provides claimants the ability to obtain a payment commensurate with their potential losses, as compared to other Class Members. This structure is fully in line with the 2018 Committee Notes’ directive to “deter or defeat unjustified claims” without being “unduly demanding.”

The Settlement, which allows Plaintiffs to apply for service awards of up to \$5,000 each, does not improperly grant them preferential treatment. Rather, it is an appropriate amount to compensate them for their time and dedication to the case, as

1 well as for the risks they undertook in bringing this Action. *See, eg.*, ECF Nos. 85, 143,  
2 152. *See also Ahmed v. HSBC Bank USA*, No. ED CV 15-2057 FMO (SPx), 2019 U.S.  
3 Dist. LEXIS 104401, \*34 (C.D. Cal. Jun. 21, 2019) (finding \$5,000 incentive award  
4 “presumptively reasonable”) (citing *In re Online DVD-Rental*, 779 F.3d 934, 947-48  
5 (9th Cir. 2015) (upholding \$5,000 incentive awards that were roughly 417 times  
6 larger).

7 **b. The Ninth Circuit’s Factors Weigh in Favor of**  
8 **Preliminary Approval.**

9 **i. Strength of Plaintiffs’ Case and Specific Risks of**  
10 **This Litigation**

11 In determining the likelihood of a plaintiff’s success on the merits of a class  
12 action, “the district court’s determination is nothing more than an amalgam of delicate  
13 balancing, gross approximations and rough justice.” *Officers for Justice*, 688 F.2d at  
14 625 (internal quotations omitted). The court may “presume that through negotiation,  
15 the Parties, counsel, and mediator arrived at a reasonable range of settlement by  
16 considering Plaintiff’s likelihood of recovery.” *Garner v. State Farm. Mut. Auto. Ins.*  
17 *Co.*, 2010 WL 1687832, at \*9 (N.D. Cal. Apr. 22, 2010) (citing *Rodriguez v. West*  
*Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

18 Plaintiffs believe that they could prove to a jury that Yes To engaged in deceptive  
19 conduct in connection with the marketing, packaging, and sale of the Product. But  
20 Plaintiffs also understand that proceeding to trial poses serious risks. Such  
21 considerations have been found to weigh heavily in favor of settlement. *See Rodriguez*,  
22 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, 2008 WL 4667090, at \*4  
23 (N.D. Cal. Oct. 22, 2008) (“Settlement avoids the complexity, delay, risk and expense  
24 of continuing with the litigation and will produce a prompt, certain, and substantial  
25 recovery for the Plaintiff class.”).

26 Although Plaintiffs and Class Counsel have confidence in their claims, a  
27 favorable outcome is not assured. Plaintiffs and Class Counsel also recognize that they  
28 will face risks at class certification, summary judgment, and trial. Defendant vigorously



1 denies Plaintiffs’ allegations, asserts that individual issues predominate such that class  
2 certification would be improper (other than for purposes of effectuating this  
3 Settlement), and believes its voluntary recall was sufficient. *See* Dkt. Nos. 25, 30. In  
4 addition, Defendant would no doubt present a vigorous defense at trial, and there is no  
5 assurance that Plaintiffs would prevail – or even if they did, that they would not be able  
6 to obtain an award of damages significantly more than achieved here absent such risks.  
7 Thus, in the eyes of Class Counsel, the proposed Settlement provides the Class with an  
8 outstanding opportunity to obtain significant relief at this stage in the litigation. *Wade*  
9 Dec. ¶18-20; *Kopel* Dec. ¶9-11.

10 The Settlement also abrogates the risks that might prevent them from obtaining  
11 relief. Since the risks of proceeding to trial are substantial, the settlement warrants  
12 preliminary approval. *See e.g., Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221  
13 F.R.D. 523, 526 (C.D. Cal. 2004) (“The Court shall consider the vagaries of litigation  
14 and compare the significance of immediate recovery by way of the compromise to the  
15 mere possibility of relief in the future, after protracted and expensive litigation. In this  
16 respect, ‘It has been held proper to take the bird in hand instead of a prospective flock  
17 in the bush.’” (citations omitted)). Here, the Settlement eliminates these risks by  
18 ensuring class members a recovery that is “certain and immediate, eliminating the risk  
19 that class members would be left without any recovery ... at all.” *Fulford v. Logitech,*  
20 *Inc.*, 2010 U.S. Dist. LEXIS 29042, at \*8 (N.D. Cal. Mar. 5, 2010). This avoidance of  
21 risks is especially persuasive where, as here, Plaintiffs have secured nearly full refunds  
22 for up to six Masks through settlement. It is hard to imagine obtaining a recovery greater  
23 than this at trial.

#### 24 **ii. The Settlement Amount is More Than Fair**

25 Under the Settlement, Defendant will pay \$750,000 into a Settlement Fund for  
26 the benefit of the Settlement Class. Agreement, §2.1. Class Members who submit valid  
27 claims may recover \$3 for each Mask he or she purchased or used, up to a maximum of  
28 six (6) Masks. *Id.*, §2.4(a). No proof of purchase is required. *Id.*, §2.5. Payment will

1 be adjusted based on the number of claims submitted and the portion of the Settlement  
2 Fund available for distribution. This structure will ensure total exhaustion of the  
3 Settlement Fund, with every penny going directly to class members (after distribution  
4 of costs and fees). *Id.*, §2.7.

5 The value of the Settlement Fund correlates closely to the approximate total sales  
6 of the Product in the United States (less than \$735,000) and the small potential class  
7 size. The individual amount available under the Settlement (\$3 per mask) is also parallel  
8 to the retail price of the Product (less than approximately \$4). Thus, the settlement is  
9 fair, reasonable, and adequate given the risks associated with attempting to establish  
10 and collect on claims through litigation and appeal, the settlement should be presumed  
11 to be in the “reasonable range of settlement.” *Garner v. State Farm. Mut. Auto. Ins.*  
12 *Co.*, 2010 WL 1687832, at \*9 (N.D. Cal. Apr. 22, 2010) (citing *Rodriguez v. West*  
13 *Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

### 14 **iii. The Extent of Discovery and Status of Proceedings**

15 The Court must also evaluate whether class counsel had sufficient information to  
16 make an informed decision about the merits of the case. *See In re Mego Fin. Corp. Sec.*  
17 *Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Class Counsel possessed all information  
18 necessary to evaluate the case, determine all the contours of the proposed class, and  
19 reach a fair and reasonable compromise after negotiating the terms of the settlement at  
20 arms’ length and with the assistance of a neutral mediator. Wade Dec., ¶19; Kopel Dec.,  
21 ¶9. They therefore had sufficient information to make an informed decision about the  
22 merits of this case as compared to the benefit provided by the proposed settlement. *See*  
23 *supra* § II. Additionally, substantial settlement negotiations have taken place between  
24 the Parties. The Settlement is plainly the result of fully-informed negotiations.

### 25 **iv. Experience and Views of Counsel**

26 “The recommendations of plaintiffs’ counsel should be given a presumption of  
27 reasonableness.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal.  
28 2008). Deference to Plaintiffs’ counsel’s evaluation of the Settlement is appropriate

1 because “[p]arties represented by competent counsel are better positioned than courts  
2 to produce a settlement that fairly reflects each party’s expected outcome in litigation.”  
3 *Rodriguez*, 563 F.3d at 967 (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d at 378).

4 Here, the Settlement was negotiated by counsel with extensive experience in  
5 consumer class action litigation. *See* Wade Dec., ¶¶9-17, Ex. 2; Kopel Dec., ¶13.  
6 (describing Class Counsel’s experience). Based on their collective experience, Class  
7 Counsel concluded that the Stipulation of Settlement provides exceptional results for  
8 the class while sparing the class from the uncertainties of continued and protracted  
9 litigation.

10 **VI. THE COURT SHOULD PROVISIONALLY CERTIFY THE**  
11 **SETTLEMENT CLASS FOR THE PURPOSES OF**  
12 **PRELIMINARY APPROVAL**

13 The Ninth Circuit has recognized that certifying a settlement class to resolve  
14 consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. A court must  
15 determine whether the putative settlement class satisfies the requirements for class  
16 certification under Rule 23. *See* Fed. R. Civ. P. 23(e) (“The claims, issues, or defenses  
17 of a certified class may be settled, voluntarily dismissed, or compromised only with the  
18 court’s approval.”). In assessing those class certification requirements, a court may  
19 properly consider that there will be no trial. *Amchem Prod., Inc. v. Windsor*, 521 U.S.  
20 591, 620, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (“Confronted with a request for  
21 settlement-only class certification, a district court need not inquire whether the case, if  
22 tried, would present intractable management problems ... for the proposal is that there  
23 be no trial.”).

24 **A. Numerosity**

25 A proposed class must be so numerous that joinder of all members individually  
26 is impractical. Fed. R. Civ. P. 23(a)(1). Courts have found that the numerosity  
27 requirement “has been satisfied when the class comprises 40 or more members and will  
28 find that it has not been satisfied when the class comprises 21 or fewer.” *Berry v. Baca*,

1 No. CV 01-02069 DDP, 2005 WL 1030248, at \*3 (C.D. Cal. May 2, 2005) (citing  
2 *Ansari v. New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y.1998)). Here, Defendant sold  
3 hundreds of thousands of units, thus this threshold has been greatly exceeded.

#### 4 **B. Commonality and Predominance**

5 Rule 23(a)(2) requires a showing that “there are questions of law or fact common  
6 to the class.” Commonality is established if plaintiffs and class members’ claims  
7 “depend on a common contention,” “capable of class-wide resolution ... meaning that  
8 determination of its truth or falsity will resolve an issue that is central to the validity of  
9 each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541,  
10 2551 (2011). Because the commonality requirement may be satisfied by a single  
11 common issue, it is easily met. H. Newberg & Conte, 1 Newberg on Class Actions §  
12 3.10, at 3-50 (1992).

13 Likewise, under Rule 23(b)(3), questions common to the class members must  
14 predominate over questions affecting only individual class members. Predominance  
15 exists “[w]hen common questions present a significant aspect of the case and they can  
16 be resolved for all members of the class in a single adjudication.” *Hanlon*, 150 F.3d at  
17 1022. As the U.S. Supreme Court has explained, when addressing the propriety of  
18 certification of a settlement class, courts consider that a trial will be unnecessary and  
19 that manageability, therefore, is not an issue. *Amchem*, 521 U.S. at 620.

20 In this case, common questions of law and fact exist and predominate over any  
21 individual questions. Indeed, all of the Class Members’ claims arise from a common  
22 nucleus of fact and are based on the same legal theories. Plaintiffs allege that  
23 “Defendant’s conduct towards the members of the Class and Subclasses is identical.  
24 Defendant uniformly, through retail locations, supplied and sold the Product to the Class  
25 and Subclasses. Plaintiffs share a common interest with all members of the putative  
26 Class and Subclasses in the objectives of the action and the relief sought. Because the  
27 Product packaging and Defendant’s marketing and deceptive conduct was uniform, the  
28 material elements of Plaintiffs’ claims and those of class members are subject to

1 common proof.” CCAC ¶¶ 67-69. Plaintiffs’ CCAC lists 16 common questions of law  
2 or fact. *Id.* ¶ 70. Accordingly, commonality is satisfied by the existence of these  
3 common factual issues. *See Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D.  
4 439, 448 (N.D. Cal. 1994) (commonality requirement met by “the alleged existence of  
5 common discriminatory practices”).

6 Second, these common question of law and fact predominate over any individual  
7 questions, including (in addition to whether this settlement is reasonable (*see Hanlon*,  
8 150 F.3d at 1026-27)), *inter alia*: (a) whether the Unicorn Mask is defective; (b) whether  
9 the Unicorn Mask causes severe skin irritation, redness, and burning; (c) whether  
10 Defendant knew or should have known about the defect in the Unicorn Mask and, if so,  
11 how long Defendant knew about the defect in the Unicorn Mask; (d) whether Defendant  
12 had a duty to disclose the defect to consumers; (e) whether Defendant breached its duty  
13 to disclose; (f) whether Defendant made material misrepresentations and/or omissions  
14 concerning the standard, quality or grade of the Unicorn Mask; and (g) Whether  
15 Plaintiffs and the Class are entitled to damages, restitution, equitable, injunctive,  
16 compulsory, or other relief. CCAC, ¶70. Because these questions apply to the claims at  
17 issue and are applicable to a nationwide class, common questions of law predominate.

### 18 C. Typicality

19 The typicality prerequisite of Rule 23(a) is fulfilled if “the claims or defenses of  
20 the representative parties are typical of the claims or defenses of the class.” *Hanlon*,  
21 150 F.3d at 1020. Here, “Plaintiffs’ claims are typical of the Class and Subclass  
22 members’ claims because they purchased the Product and were exposed to Defendant’s  
23 conduct.” CCAC ¶ 71. Plaintiffs’ claims are thus typical of the class because Plaintiffs’  
24 theory of the case applies equally to Plaintiffs and the Settlement Class Members.

### 25 D. Adequacy

26 Resolution of two questions determines legal adequacy: (1) whether the named  
27 plaintiffs and their counsel have any conflicts of interest with other class members and  
28 (2) whether the named plaintiffs and their counsel will prosecute the action vigorously

1 on behalf of the class. *Hanlon*, 150 F.3d at 1020. Plaintiffs are adequate representatives  
2 of the settlement class because they have no conflicts of interest, have remained  
3 committed to the vigorous prosecution of this action and have retained competent  
4 counsel, experienced in litigation of this nature, to represent them and the Settlement  
5 Class. Plaintiffs have continued to perform their duties as class representatives since  
6 the Court granted the motion for consolidation. *See* Wade Decl. ¶21; Kopel Dec., ¶14.  
7 For example, Plaintiffs consulted with their counsel concerning the proposed settlement  
8 to ensure that it was in the best interest of the Settlement Class Members. *Id.* Thus,  
9 Plaintiffs have adequately represented the interests of the Settlement Class Members,  
10 and should be appointed Class Representatives of the Settlement Class.

11 Class Counsel have also negotiated vigorously on their clients' behalf and  
12 eventually reached a settlement that provides potential full refunds to Class Members.  
13 Therefore, Class Counsel should be appointed to represent the interests of the  
14 Settlement Class Members.

#### 15 **E. Superiority**

16 Rule 23(b)(3) also requires that “a class action [be] superior to other available  
17 methods for fairly and efficiently adjudicating the controversy.” Here, joinder of all  
18 Settlement Class Members would create extreme hardship and inconvenience for Class  
19 Members as they reside throughout the United States. CCAC ¶ 77. Further, individual  
20 claims by class members are impractical because the costs to pursue individual claims  
21 may exceed the value of what any one class member has at stake, and as a result,  
22 individual class members may have no interest in prosecuting and controlling separate  
23 actions. *Id.* There are no known individual class members who are interested in  
24 individually controlling the prosecution of separate actions. *Id.* The interests of justice  
25 will be well served by resolving the common disputes of class members in one forum.  
26 *Id.* Individual suits would not be cost effective or economically maintainable as  
27 individual action. *Id.* Moreover, if this case were to be litigated further, Plaintiff would

28

1 take the strong position that the purported recall was insufficient and would not preclude  
2 class treatment. Thus, class treatment for settlement purposes is proper.

3 As a result, each of the requirements of Rule 23 are met, and the Court should  
4 conditionally certify the Settlement Class, for settlement purposes.

### 5 **VII. THE PROPOSED NOTICE PROGRAM SHOULD BE APPROVED**

6 Upon settlement of a certified class, “[t]he court must direct notice in a reasonable  
7 manner to all class members who would be bound by the proposal.” Fed. R. Civ. P.  
8 23(e)(1)(B). Rule 23(c)(2)(B) requires the “best notice that is practicable under the  
9 circumstances[.]” The notice may be “electronic means, or other appropriate means.”  
10 *Id.* The best practicable notice is that which is “reasonably calculated, under all the  
11 circumstances, to apprise interested parties of the pendency of the action and afford  
12 them an opportunity to object.” *Mullane v. Central Hanover Bank & Trust Co.*, 339  
13 U.S. 306, 314 (1950). When a court is presented with a classwide settlement prior to  
14 the certification stage, the class certification notice and notice of settlement may be  
15 combined in the same notice. *Manual*, § 21.633 at 321-22 (“For economy, the notice  
16 under Rule 23(c)(2) and the Rule 23(e) notice are sometimes combined.”).

17 With respect to the contents of settlement notice, to satisfy Rule 23(e)(1) the  
18 notice must “present information about a proposed settlement neutrally, simply, and  
19 understandably.” *In re Hyundai*, 926 F.3d at 567 (quoting *Rodriguez*, 563 F.3d at 962).  
20 Notice “is satisfactory if it generally describes the terms of the settlement in sufficient  
21 detail to alert those with adverse viewpoints to investigate and come forward and be  
22 heard.” *Id.* (citing *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)  
23 (internal quotations omitted)). Class Notice and the Notice Plan constitute sufficient  
24 notice to the Settlement Class, satisfy Rule 23, and comply with the constitutional  
25 requirements of due process.

26 Each of the proposed forms of notice, including the Long Form (Ex. B) and Short  
27 Form (Ex. F) notices, meet all of these requirements, as detailed in the following table:  
28

Requirement	Long Form	Short Form
“The nature of the action.” Fed. R. Civ. P. 23(c)(2)(B)(i).	First introductory bullet; Q&A nos. 1 and 2.	Col. 1, ¶ 1.
“The definition of the class certified.” Fed. R. Civ. P. 23(c)(2)(B)(ii).	Third introductory bullet; Q&A no. 5.	Col. 1, ¶ 2.
“The class claims, issues, or defenses.” Fed. R. Civ. P. 23(c)(2)(B)(iii).	First introductory bullet; Q&A nos. 1, 2, 3, and 4.	Col. 1, ¶ 1.
“That a class member may enter an appearance through an attorney if the member so desires.” Fed. R. Civ. P. 23(c)(2)(B)(iv).	Table of “Your Legal Rights and Options;” Q&A no. 13, 14, and 19.	Col. 2, ¶ 4.
“That the court will exclude from the class any member who requests exclusion.” Fed. R. Civ. P. 23(c)(2)(B)(v).	Table of “Your Legal Rights and Options;” Q&A nos. 3 and 12.	Col. 2, ¶ 3.
“The time and manner for requesting exclusion.” Fed. R. Civ. P. 23(c)(2)(B)(vi).	Table of “Your Legal Rights and Options;” Q&A no. 8.	Col. 2, ¶ 3.
“The binding effect of a class judgment on members under Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B)(vii).	Table of “Your Legal Rights and Options;” Q&A nos. 9, 10, 12, 15, and 20.	Col. 1, ¶ 5.

In addition to meeting the specific legal requirements of Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii), the proposed notices are based on the Federal Judicial Center’s guidelines and model forms for notice of pendency of a class action. *See* [www.fjc.gov](http://www.fjc.gov). Based on FJC’s guidelines, the Plaintiffs and Class Counsel believe that each of the proposed class notices, which are very closely based on FJC models, with the format and content adopted almost verbatim in most instances, are accurate, balanced, and comprehensible. *Id.* The notice documents will inform Class Members of their eligibility, options for opting out or objecting to the settlement, the date and location of the Final Approval Hearing, the salient terms of the Agreement, and how to obtain additional information. *See* Exs. B and F. They also provide neutral and objective information about the nature of the Settlement. *Id.* The notice documents also explain



1 that Class Members must complete and return a Claim Form to receive payment under  
2 the Agreement. *Id.*

3 This proposed method of giving notice will be developed by Heffler Claims  
4 Group in collaboration with Class Counsel, with the objective of ensuring broad  
5 distribution of notice to Class Members in the most simple and expedient manner. *See,*  
6 *e.g.,* 4 Newberg on Class Actions § 12:35 (5th ed.) (“[A] court’s goal in distributing  
7 class action damages is to get as much of the money to the class members in as simple  
8 a manner as possible.”). Because the masks were sold at retail, Defendant does not  
9 possess information to identify and contact every Settlement Class Member, and such  
10 information cannot be otherwise obtained through reasonable efforts for purposes of  
11 giving notice. The Notice Plan is designed to reach as many Settlement Class Members  
12 as possible and encourage them to claim compensation under the Settlement. *See*  
13 *Finegan Dec.* at ¶13, 16-20, 23, 33.

14 **VIII. PROPOSED SCHEDULE OF EVENTS**

15 Attached as Appendix A is a proposed calendar of the relevant deadlines based  
16 on a March 12, 2021 Preliminary Approval date. If approval is not granted that day  
17 Class Counsel will propose revised dates.

18 **IX. CONCLUSION**

19 For the foregoing reasons, Plaintiffs respectfully request that the Court: (1)  
20 approve the Agreement; (2) provisionally certify the Settlement Class for the purposes  
21 of settlement; (3) appoint Plaintiffs as Class Representatives; (4) appoint undersigned  
22 counsel as Class Counsel; (5) appoint Heffler as the Settlement Administrator; (6)  
23 approve the proposed Notice Plan; (7) enter the [Proposed] Order Preliminarily  
24 Approving Class Action Settlement, submitted herewith; and, (8) schedule a Final  
25 Approval Hearing and related deadlines.

26 //

27 //

28 //

1 Dated: January 28, 2021

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2  
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26  
27  
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**Appendix A**

The following proposed deadlines for notice, claims and Final Approval-related deadlines are based on a February 26, 2021 Preliminary Approval date:

<b>Deadline</b>	<b>Proposed Deadline</b>
Deadline for Claim Administrator to complete publication of the Publication Notice (“Notice Date”)	April 12, 2021
Deadline to File Motion for Final Approval and Applications for Service Award, Attorneys’ Fees and Costs	July 20, 2021
Deadline to Opt out, Submit Claims or Object to Settlement	August 10, 2021
Deadline to file Reply in Support of Motion for Final Approval (Optional)	September 10, 2021
Final Approval Hearing	September 24, 2021 at 10:00 a.m.