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7  
8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 BAERBEL MCKINNEY-DROBNIS,  
11 JOSEPH B. PICCOLA, and CAMILLE  
BERLESE, individually and on behalf of all  
12 others similarly situated,

13 Plaintiffs,

14 v.

15 MASSAGE ENVY FRANCHISING, LLC, a  
Delaware Limited Liability Company,

16 Defendant.

Case No. 3:16-CV-6450-MMC (KAW)

**DECLARATION OF JEFFREY R.  
KRINSK IN SUPPORT OF  
PLAINTIFFS' MOTION FOR AWARD  
OF ATTORNEYS' FEES, EXPENSES,  
AND INCENTIVE AWARDS**

Dated: November 1, 2019  
Time: 9:00 am  
Courtroom: 7 – 19<sup>th</sup> Floor  
Judge: Hon. Maxine M. Chesney

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19 **UNREDACTED DOCUMENT FILED AS PER THE COURT'S ORDER [Dkt. No. 120]**  
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1 I, Jeffrey R. Krinsk, hereby declare and state as follows:

2 1. I am over eighteen years of age and the managing partner of Finkelstein & Krinsk, LLP,  
3 counsel for Plaintiffs Baerbel McKinney-Drobni, Joseph B. Piccola, and Camille Berlese in the above  
4 captioned case. I have personal knowledge of the matters set forth herein, based on my active  
5 participation in all material aspects of this litigation and Settlement. If called upon, I could and would  
6 testify competently to the facts herein based upon my personal involvement in this case. I am making  
7 this declaration in support of Plaintiffs' Motion for Award of Attorneys' Fees, Expenses, and Incentive  
8 Awards.

9 **I. SETTLEMENT BACKGROUND**

10 **A. Overview of the Parties' Claims and Defenses**

11 1. Massage Envy Franchising LLC ("MEF") conducts a business format franchise with a  
12 nationwide footprint from its corporate offices in Scottsdale, Arizona. It has authorized more than 1,200  
13 independently owned and operated businesses to open and operate a franchised clinic or spa (i.e., ME  
14 Location), providing massage or other personal services. Each ME Location allows consumers the  
15 opportunity to become a "Massage Envy" member. Plaintiffs allege that MEF, as a franchisor,  
16 maintains control over the business practices of its franchised location. *See* Plaintiffs' First Amended  
17 Complaint ("FAC"), ECF No. 60, at ¶¶ 15-16. Plaintiffs further allege the relationship between MEF  
18 and its franchisees is governed by Massage Envy's standard form Franchise Agreement, which requires  
19 franchisees to comply with all of MEF's "Systems Standards." *Id.*

20 2. Plaintiffs assert that MEF's "Systems Standards" govern the terms and format of  
21 membership agreements and that Massage Envy franchised locations can only use approved  
22 Membership forms to offer approved Memberships. *Id.*, at ¶ 15. As part of these Systems Standards,  
23 Plaintiffs additionally allege MEF requires its franchised locations to exclusively use established  
24 membership pricing. *Id.*, at ¶ 46.

25 3. Plaintiffs contend that MEF's business model entails the marketing of a "membership" to  
26 consumers that upon acceptance entitles the consumer to receive a fifty-minute massage (or a similar spa  
27 service) per month in exchange for a flat monthly fee. *Id.*, at ¶ 18. These massages and spa services can  
28 be redeemed at any Massage Envy franchised location, nationwide. *Id.*, at ¶ 16.

1           4.       Plaintiffs contend the relationship between the putative Class Members and MEF and/or a  
2       Massage Envy franchised location is governed by the Membership Agreement. *See generally id.*  
3       Plaintiffs assert that the Membership Agreement is (and was) drafted by Defendant and then distributed  
4       to its franchisees who are required to use them for each Class Member without material modification.  
5       *Id.*, at ¶ 15.

6           5.       The standard Membership Agreement is a two page document. The first page is signed  
7       by each Settlement Class Member and Plaintiffs contend includes the following material provisions (the  
8       “Membership Dues Clause”):

9                   Your Membership dues of \$39 (not including any additional applicable taxes) will be due  
10                  on July 14th and then due on or after the same day of each month hereafter until your  
11                  membership expires or is terminated in accordance with the agreement.

12                  [Berlese’s Initials] (Initial) Your membership is auto-renewable. Following the initial  
13                  term, your membership will automatically continue on a month-to-month basis at \$39 per  
14                  month until your membership is cancelled.

15       *See* Declaration of Jeffrey Krinsk [ECF No. 107], Exhibits A, Plaintiff Berlese’s Membership  
16       Agreement.

17           6.       Plaintiffs also further allege that each Class Member’s Membership Agreement specifies,  
18       *inter alia*, when a membership may be cancelled or terminated. *Id.* A member can cancel their  
19       membership upon 30-days written notice. *Id.* A Massage Envy franchised location, on the other hand,  
20       may terminate a person’s membership for unsatisfactory payment or for violations of the rules and  
21       regulations, or otherwise. *Id.*

22           7.       Based on a literal reading of the Membership Dues Clause, Plaintiffs allege that after the  
23       “initial” term, the membership can automatically continue on a “month-to-month basis” at the specified  
24       monthly amount “until” the membership is terminated.

25           8.       MEF has consistently argued that the Membership Agreements are contracts with its  
26       franchised locations (and not MEF itself) and, separately, that a member’s monthly membership dues  
27       can be changed under the Membership Agreements. MEF has directed Plaintiffs to the following  
28       provisions (the “Modification Clause”) of the second page of Plaintiffs’ Membership Agreement(s) to  
29       support its position:

1 You have the right to receive a notice of change in the event that any changes to the terms  
2 and conditions of your membership are implemented that will vary the amount to be  
3 periodically billed to your account as specified in the Membership Description and  
4 Payment Schedule section of this agreement. We will send you a notice of change at the  
5 mailing address you have provided at the top of this Agreement at least ten days prior to  
6 the effective date of such change. Except as expressly provided herein, we may modify  
7 our services or the terms and conditions of this Agreement at any time without notice and  
8 such modifications shall be deemed effective immediately upon making such changes.

9 *See* Declaration of Jeffrey Krinsk [ECF No. 107], Ex. A. Under MEF's proposed interpretation, MEF  
10 argues that a member's monthly membership dues can be changed repeatedly given sufficient notice.

11 9. The interpretation of the Membership Dues Clause and Modification Clause, however, is  
12 not the only dispute at bar. As noted above, MEF also asserts that it is not a party to the Membership  
13 Agreement and, *ergo*, cannot be held responsible for any damages that result from a breach thereof.

14 10. The evidence demonstrates an element of ambiguity on this point. The Plaintiffs'  
15 Membership Agreements define the contacting parties as "[w]e use the words 'you' and 'your' to mean  
16 the Buyer. The words 'we' and 'our' refer to Massage Envy." *See id.* Plaintiffs understand the  
17 Membership Agreements "Massage Envy" to identify MEF, the owner of the Massage Envy trademark  
18 and brand.

19 11. Plaintiffs, nevertheless, recognize that the Membership Agreements changed during the  
20 relevant time period adding a disclaimer that "YOU ACKNOWLEDGE THAT MASSAGE ENVY SPA  
21 OR CLINIC IS AN INDEPENDENTLY OWNED AND OPERATED FRANCHISEE AND THAT  
22 YOUR AGREEMENT IS WITH ONE OF THESE, AND NOT WITH MASSAGE ENVY  
23 FRANCHISING LLC, THE FRANCHISOR." This language suggest an alternative interpretation of the  
24 Membership Agreement.

25 12. Plaintiffs argue that even if MEF was not a party to the Membership Agreements that it  
26 would not prevent Plaintiffs from establishing MEF's proper liability. The law holds that individuals  
27 cannot induce others to breach contractual obligations:

28 The courts provide a damage remedy against third party conduct intended to disrupt an  
existing contract precisely because the exchange of promises resulting in such a formally  
cemented economic relationship is deemed worthy of protection from interference by a  
stranger to the agreement.

*See, e.g., Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal.4th 376, 392 (1995). Accordingly,  
Plaintiffs amended their complaint to include a cause of action for intentional interference with

1 contractual relations. FAC, at ¶¶ 42-48.

2 13. MEF did not, to date, contest that Membership Agreements are binding on the Class  
3 Members or that MEF lacked knowledge of these Agreements. Nor does MEF contest that monthly  
4 membership dues were increased. MEF disputes any interpretation that suggests its franchised locations  
5 cannot increase monthly dues without violating the Membership Agreements of the Class Members.

6 14. But even if liable, MEF has maintained that liability should be limited to its share the  
7 revenues derived from the Class Members' Memberships. MEF operates under a franchise business  
8 model. Each of the individual Massage Envy franchised location are independently owned and operated  
9 by separate entities with separate ownership. Pursuant to the terms of the Franchise Agreements, each  
10 ME Location pays a modest share of their net revenue to MEF.

11 **B. Procedural History**

12 15. A review of the docket will confirm that this case has been hardily contested. Defendant  
13 was represented by experienced lawyers from two respected law firms (Sacks Ricketts and Case LLP  
14 and Gibson, Dunn & Crutcher, LLP) with a deserved reputation for vigorous advocacy.

15 16. Plaintiffs filed this class action on November 4, 2016 (ECF No. 1) and MEF answered  
16 the Complaint on October 6, 2017 (ECF No. 17). MEF generally denied Plaintiffs' allegations and  
17 further stated that:

- 18 • MEF denies that the Plaintiffs, or any member of the Class, "signed a membership  
19 agreement or any other contract to which MEF is a party" (*id.*, at ¶¶ 9, 11, 13, 19);
- 20 • "there is no single 'Membership Agreement'" that all members of independently  
21 owned and operated Massage Envy® franchised locations enter or execute" (*see, e.g., id.*,  
22 at ¶ 1); and
- 23 • "members of independently owned and operated Massage Envy® franchised locations  
24 do not pay any membership fees to MEF" (*see, e.g., id.*, at ¶ 1).

25 MEF responded to the Complaint by asserting twenty-nine Affirmative Defenses, including MEF's "Res  
26 Judicata," "Impermissible Claims Splitting," "Claims Released," and "Waiver." *Id.* MEF's various  
27 preclusion and waiver defenses argued that Plaintiffs' claims were completely released by *Hahn v.*  
28 *Massage Envy Franchising, LLC*, No. 3:12-cv-00153 (S.D. Cal.), *Zizian v. Massage Envy Franchising,*

1 *LLC*, No. 16-cv-00783 (S.D. Cal.) and *Bandell, et al. v. Massage Envy Franchising, LLC*, No. 16-cv-  
2 01236 (S.D. Cal.).

3 17. On January 27, 2017, Plaintiffs filed a Motion to Strike Defendant's Affirmative  
4 Defenses. On the same day, MEF filed its Motion for Judgment on the Pleadings or, in the Alternative,  
5 to Strike Class Action Allegations. *See* ECF No. 26. MEF's Motion advanced two arguments: (1) that  
6 Plaintiffs' claims were released by the *Hahn* (and the two other related) settlements, and (2) that  
7 Plaintiffs' counsel were prohibited from representing a class of current Massage Envy member's based  
8 on rulings of the earlier *Hahn* litigation. *Id.*

9 18. Filed on January 18, 2012, the *Hahn* lawsuit asserted that MEF improperly forfeited  
10 prepaid, but unused, massages upon cancelation or termination of the customers' Membership  
11 Agreement. *Hahn v. Massage Envy Franchising, LLC*, No. 3:12-cv-00153, 2014 WL 5099373, at \*2  
12 (S.D. Cal. Apr. 15, 2014) (explaining the "gravamen" of *Hahn*). This litigation resulted in *Hahn's*  
13 "massage-reinstatement" settlement, by which MEF agreed to give *Hahn* class members approximately  
14 75% of the prepaid massages that Massage Envy had previously forfeited to be reinstated to those class  
15 members. *See* Massage Envy's Request for Judicial Notice [ECF26-1], at Ex. F.

16 19. *Hahn* settled the claims for a subset of the Massage Envy members that were injured, in  
17 the past, by the membership forfeiture policy. Accordingly, the *Hahn* settlement spawned *Zizian* and  
18 *Bandell*, two cases that asserted identical claims, but on behalf of two classes separate from the *Hahn*  
19 class. *See generally* the *Zizian* Class Action Settlement and Release (*See* Massage Envy's Request for  
20 Judicial Notice [ECF26-1], Ex. M). The *Zizian* and *Bandell* classes promptly agreed to a "massage-  
21 reinstating" settlement with MEF based on nearly identical terms as proposed in the *Hahn* settlement.  
22 *Id.* Plaintiffs to this action were not named parties in *Hahn*, *Zizian*, or *Bandell* lawsuit, but were class  
23 members who received injunctive relief under the *Zizian* settlement.

24 20. The briefing on both Plaintiffs' Motion to Strike Defendant's Affirmative Defenses and  
25 MEF's Motion for Judgment on the Pleadings, and related motions, included multiple requests for  
26 judicial notice. *See* Dkt Nos. 25, 26-1, 27-1, 45.

27 21. At the same time as its Motion for Judgment on the Pleadings, MEF filed three additional  
28 motions: (1) a Motion to Stay Discovery (ECF No. 27), (2) a Motion to Shorten Time for briefing and

1 hearing on MEF's Motion to Stay Discovery (ECF No. 28), and (3) an Administrative Motion to Vacate  
2 and Continue Initial Case Management Conference and Associated Deadlines (ECF No. 29).

3 22. Plaintiffs opposed the latter two of these motions, in an abbreviated time period. *See*  
4 Opposition to Motions to Shorten Time and Vacate and Continue Initial Case Management Conference,  
5 ECF No. 31 (filed on January 31, 2017).

6 23. The Court granted the Motions to Shorten Time (ECF No. 34) and Vacate and Continue  
7 Initial Case Management Conference (ECF No. 33) on February 1, 2017.

8 24. Plaintiffs filed their opposition to MEF's Motion to Stay Discovery on February 6, 2017  
9 (ECF No. 35) and MEF's Motion was granted on February 10, 2017. Discovery was thereby stayed  
10 until the Court issued its ruling on MEF's Motion for Judgment on the Pleadings. *Id.*

11 25. On April 5, 2017, the Court granted Plaintiffs' Motion to Strike twenty-five of MEF's  
12 twenty-nine Affirmative Defenses, striking all but MEF's two affirmative defenses challenging the  
13 constitutionality of restitution under the UCL, its claim that MEF's franchises are "indispensable  
14 parties," and its claim to "offset" its liability by any award of funds owed MEF by Class Members. *See*  
15 Order Denying Defendant's Motion for Judgment on the Pleadings, ECF No. 49, at pp. 11-18. In the  
16 same Order, the Court denied Defendant's Motion for Judgment on the Pleadings finding, in part, that  
17 the *Hahn* settlement could not have released the claims at bar under the "Identical Factual Predicate"  
18 doctrine. *Id.*, at pp. 4-9.

19 26. With the parties initial motion practice disposed of, the parties conducted their Rule 26(f)  
20 conference and submitted their Joint Rule 26(f) Report and Discovery Plan on April 14, 2017. Plaintiffs  
21 began their discovery efforts. MEF, however, did not concede.

22 27. On April 20, 2017, MEF filed a Motion for Certification of Order for Interlocutory  
23 Appeal. MEF argued that the U.S. Supreme Court holdings in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.  
24 Ct. 1036, 1046-48 (2016) and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) prevented the  
25 Court from limiting the terms of the *Hahn* Settlement and had effectively overturned the "identical  
26 factual predicate" rule to the extent it improperly abridged MEF's substantive rights. *See generally* ECF  
27 No. 52. Alternatively, MEF asserted that even if the "identical factual predicate" rule was valid, it did  
28 not prevent the application of the *Hahn* release to this case. *Id.*

1           28.     Concurrently with the above, MEF also filed a Motion to Stay the Litigation (ECF No.  
2 52), pending the outcome of the requested Interlocutory Appeal, and a Motion to Shorten Time for  
3 briefing and hearing on MEF's Motion to Stay Discovery (ECF No. 53).

4           29.     Plaintiffs opposed the Motion to Shorten Time on April 24, 2017. ECF No. 57. But,  
5 MEF's Motion to Shorten Time was granted by the Court on April 26, 2017. *See* Order Granting MEF's  
6 Motion To Shorten Time On Motion To Stay, ECF No. 59.

7           30.     Accordingly, Plaintiffs filed their Opposition to MEF's Motion to Stay on May 1, 2017.  
8 ECF No. 61. Concurrently, Plaintiffs also opposed MEF's Motion for Interlocutory Certification of  
9 Order for Interlocutory Appeal. *Id.* The Court thereupon denied both MEF's Motions to Stay and for  
10 Interlocutory Certification of Order for Interlocutory Appeal on May 17, 2017.

11           31.     During this briefing, the parties also amended their respective pleadings. MEF filed their  
12 Amended Answer on April 24, 2017. ECF No. 58. Plaintiffs, in turn, amended their Complaint on April  
13 28, 2017. *See* FAC, ECF No. 60. Plaintiffs' asserted an additional claim for tortious interference with  
14 contractual relations. *Id.* MEF answered the Amended Complaint on May 22, 2017. Answer to  
15 Amended Complaint, ECF No. 69.

16           32.     On April 21, 2017, the parties held an initial case management conference during which  
17 the parties agreed to submit a joint proposed briefing schedule for Plaintiffs' Motion for Class  
18 Certification after the Court's decision on MEF's Motion for Interlocutory Certification of Order for  
19 Interlocutory Appeal. *See* Civil Minutes, ECF No. 56. In the parties' joint proposed briefing schedule,  
20 MEF represented that it:

21           anticipates filing a motion for summary judgment prior to Plaintiffs' anticipated motion  
22 for class certification based upon the following provisions in Plaintiffs' membership  
23 agreements with their independently owned and operated Massage Envy® franchised  
24 locations that expressly authorized the monthly membership fee increases Plaintiffs  
25 challenge in this action: (a) "You have the right to receive a notice of change in the event  
26 that we make any changes to the terms and conditions of your membership that will vary  
27 the amount to be periodically billed to your account specified above. We will send you a  
28 notice of change at the mailing address at the top of this Agreement at least ten days prior  
to the effective date of such change." and (b) the independently owned and operated  
Massage Envy® franchised locations "reserve[d] the right to change clinic rules,  
regulations, or pricing an any time upon providing reasonable notice." Plaintiffs will  
oppose any MEF motion for summary judgment and may move for summary  
adjudication regarding Plaintiffs' contract claim concurrently with its opposition.

*See* Joint Stipulation RE: Schedule for Briefing on Plaintiffs' Motion for Class Certification, ECF No.

1 70. Accordingly, Plaintiffs prepared to oppose MEF's motion for summary judgment and file a cross  
2 motion for summary adjudication on the same issues before the deadline for Plaintiffs to file their  
3 motion for class certification, February 23, 2018. *See* Order Approving Stipulated Schedule for Briefing  
4 on Plaintiffs' Motion for Class Certification, ECF No. 71.

5 33. These preparations were interrupted by MEF's Petition for Writ of Mandamus, which  
6 was filed with the United States Court of Appeals for the Ninth Circuit on June 13, 2017. On July 26,  
7 2017, the Ninth Circuit ordered that Plaintiffs provide an answer to MEF's Petition, and ordered the  
8 Court to also brief the matter, if it wished.

9 34. On August 9, 2017, Plaintiffs filed their Answering Brief to MEF's Petition.

10 35. On October 11, 2017, the Ninth Circuit denied MEF's Petition, stating that "Petitioner  
11 has not demonstrated that this case warrants the intervention of this court by means of the extraordinary  
12 remedy of mandamus." The Ninth Circuit did not discuss the merits of MEF's Petition. Since the denial  
13 of the Petition, MEF's counsel have repeatedly told Plaintiffs that MEF intended to raise the same issues  
14 in the Petition on appeal should the Court enter judgment in favor of Plaintiffs.

15 36. On September 6, 2017, Plaintiffs moved to quash the subpoenas to Kathleen "Kay"  
16 Piccola (the wife of Plaintiff Piccola), Burton Drobnis (the husband of Plaintiff McKinney-Drobnis),  
17 Robert Berlese, Lia Berlese, Angela Berlese, and Christopher Berlese (respectfully, the husband,  
18 daughters and son of Plaintiff Berlese), and Michael Damiani (an acquaintance of Ms. Berlese) and for a  
19 protective order. ECF No. 79. Plaintiffs also moved to stay any discovery related to Ms. Kathleen  
20 Piccola, Mr. Burton Drobnis, Ms. Angela Berlese, Ms. Lia Berlese, Mr. Chris Berlese, Mr. Robert  
21 Berlese, and Mr. Michael Damiani while the Court addressed Plaintiffs Motion to Quash and for a  
22 Protective Order. ECF No. 80.

23 37. The Court referred this matter to Judge Kandis A. Westmore on September 7, 2017. ECF  
24 No. 81. Judge Westmore terminated the Plaintiffs' Motions and ordered the parties to meet and confer,  
25 then prepare a joint letter to explain their dispute. ECF No. 82. The parties did so, filing a Joint  
26 Discovery Letter Brief on September 26, 2017. ECF No. 83. Judge Westmore thereafter granted  
27 Plaintiffs' Motion to Quash as to Ms. Kathleen Piccola, Ms. Angela Berlese, Ms. Lia Berlese, Mr. Chris  
28 Berlese, Mr. Robert Berlese, and Mr. Michael Damiani, but ordered the limited the deposition of Mr.

1 Burton Drobni. ECF No. 87.

2 38. On August 31, 2017, with the first deadlines on the Class Certification Motion drawing  
3 near, the parties agreed to stay the litigation and attend mediation. Stipulation to Stay Case and Vacate  
4 Deadlines Pending Mediation, ECF No. 88. This stay would eventually be extended and remain in place  
5 until August 20, 2018, when settlement discussion broke down and the stay was lifted. Order Lifting  
6 Stay of Case and Approving Stipulated Schedule for Briefing, ECF No. 96.

7 39. On September 4, 2018, MEF filed a Motion to modify in part and set aside Judge  
8 Westmore's order on the parties' Joint Discovery Letter Brief. ECF No. 97. This Motion was denied by  
9 the Court before Plaintiffs could respond. ECF No. 98.

10 40. After the stay was lifted, Plaintiffs began, in earnest, to prepare for MEF's anticipated  
11 Motion for Summary Judgment and to file a cross motion for summary adjudication. (In fact, Plaintiffs'  
12 motion for summary adjudication was largely prepared and ready to file when the case settled.)  
13 Additionally, Plaintiffs were preparing their motion for class certification for filing at this time.

14 41. In total, the parties filed or opposed nine contested motions, a petition of writ of  
15 mandamus, and had prepared to file dispositive motions and motion for class certification at the time of  
16 settlement.

17 **C. The Parties' Discovery Efforts**

18 42. The parties have engaged in significant discovery for this case. On May 2, 2017,  
19 Plaintiffs propounded their first set of written discovery on MEF, including thirteen interrogatories and  
20 twenty-four document requests. Plaintiffs would serve additional discovery requests, including two  
21 more sets of interrogatories (for a total of twenty-five interrogatories) and three more sets of Document  
22 Production (for a total of fifty-five document requests). Additionally, Plaintiffs had issued two  
23 subpoenas to marketing firms which provide MEF with certain products and services, and three  
24 subpoenas to Roark Capital (the owner of MEF). Counsel also had the benefit of knowledge gathered  
25 during the *Hahn* litigation.

26 43. Plaintiffs' discovery requests became the subject to contentious meet and confer sessions,  
27 after which Defendant provided supplemental responses. During the parties' meet and confer sessions,  
28 both parties agreed that the search for certain Electronically Stored Information ("ESI") should be

1 coordinated, to ensure that the parties would only have to search these ESI repositories once.  
2 Accordingly, the parties jointly initiated discussions regarding the applicable search protocol and  
3 applicable perimeters. The parties similarly discussed the production of MEF's Millennium Database,  
4 which included information regarding the identity of the Class and their corresponding transaction  
5 history. The parties were discussing production of ESI and further document discovery when the case  
6 settled.

7 44. Plaintiffs at the time of settlement had also noticed the depositions of three key corporate  
8 officers prior to the August 31, 2017 agreement to stay the action.

9 45. MEF also served discovery on Plaintiffs and third-parties. MEF served each Plaintiff  
10 with a set of interrogatories, document requests, and requests for admissions. Plaintiffs expended  
11 significant time gathering documents and information in responding to these requests. MEF also  
12 deposed each of the named Plaintiffs.

13 46. Moreover, as noted above, MEF sought to depose Ms. Kathleen Piccola, Ms. Angela  
14 Berlese, Burton Drobnis, Ms. Lia Berlese, Mr. Chris Berlese, Mr. Robert Berlese, and Mr. Michael  
15 Damiani. Plaintiffs discussed the subpoenas with these individuals and informed them of the legal  
16 standards controlling their obligations.

17 47. In total, Plaintiffs received and reviewed over 7,000 pages of documents. Based on  
18 Plaintiffs' experience with the *Hahn* litigation, Plaintiffs believed that had this case continued, it would  
19 have included significant additional discovery that would be expensive and time consuming, likely  
20 involving experts and additional motion practice by the parties. Indeed, Plaintiffs' counsel was seeking  
21 to retain ESI discovery experts at the time of the Settlement.

#### 22 **D. Settlement Negotiations**

23 48. Throughout this litigation, with varying degrees of interest, the parties explored  
24 settlement of Plaintiffs' claims. On October 10, 2017, the parties agreed to stay discovery, so they could  
25 focus on Settlement issues and suitable parameters of mediation. The parties' counsel originally met on  
26 October 27, 2017, in Phoenix, Arizona, to discuss their respective settlement positions. At this meeting,  
27 the parties discussed their theories of liability, and the possibility of initiating private mediation. The  
28 parties ultimately agreed to mediation before David A. Rotman on February 8, 2018.

1           49. Prior to the February 8, 2018 mediation, Defendant provided Plaintiffs with additional  
2 discovery regarding the claims of the Class. Based on this information, Plaintiffs were able to create a  
3 damages model.

4           50. The parties made significant progress at the February 8, 2018 mediation, discussing their  
5 respective claims and defenses and potential alternative structures for a settlement. The parties were,  
6 nonetheless, unable to reach an agreement at the February 8, 2018 mediation.

7           51. Over the next few months, the parties' counsel engaged in direct negotiation. Through  
8 telephone and email exchanges, the parties slowly narrowed the points of disagreement on several key  
9 terms. Particularly, the parties discussed the nature of the relief, structure of the settlement, claims  
10 administration, the language of the release, and the availability of injunctive relief. The parties also  
11 exchanged additional factual information, including MEF's financial records. The parties, believing that  
12 they had made significant progress in their settlement discussions, agreed to extend the stay of litigation  
13 on June 14, 2018, so that settlement discussion could continue in earnest. Stipulation to Extend Stay,  
14 ECF No. 93.

15           52. During this time, both parties expressed an interest in returning to Mr. Rotman for a  
16 second mediation. While the parties were initially agreeable (and scheduled the follow-up mediation for  
17 August 8, 2018), a disagreement regarding a number of mediation preconditions frustrated immediate  
18 progress. This disagreement ultimately lead to the planned mediation being cancelled and the parties'  
19 jointly requesting a lift of the litigation stay. Order Lifting Stay of Case, ECF No. 96.

20           53. With the stay lifted, the parties resumed their previous litigation efforts. As a part of  
21 these efforts, Plaintiffs again initiated meet and confer efforts concerning outstanding pending discovery  
22 disputes and outstanding requests for production. Specifically, the parties discussed ESI discovery  
23 concerning Defendant's email system and internal databases. Plaintiffs renoticed the depositions of  
24 MEF's corporate officers and were preparing for additional deposition notices of MEF employees.

25           54. Plaintiffs also discussed briefing schedules for the parties' respective cross motions for  
26 summary judgment and adjudication with Defendant's counsel. Plaintiffs believed the dispositive  
27 motions were particularly important because the Court might adjudicate the merits of the parties'  
28 contract dispute through summary adjudication. Nevertheless, the upcoming dispositive motions and

1 class certification again refocused the parties on settlement discussions.

2 55. The parties agreed to return to mediation before Mr. Rotman on November 11, 2018. It  
3 was at this second mediation that the parties agreed on the material terms of Settlement.

4 56. The final settlement agreement, and related documents, would not be finalized and  
5 executed until March 11, 2019.

## 6 **II. THE PROPOSED SETTLEMENT BENEFIT**

7 57. The Settlement Agreement defines the Class as “all MEMBERS of an ME LOCATION  
8 since November 4, 2006, who paid a FEE INCREASE prior to the date of PRELIMINARY  
9 APPROVAL.” See Declaration of Jeffrey Krinsk [ECF No. 107], Ex. D (the “Settlement Agreement” or  
10 “Agreement) at § I(A)(E). “Excluded from the CLASS are: (a) any person who is an employee, director,  
11 officer, or agent of MEF or any of the RELEASED PARTIES; (b) any judge, justice, judicial officer, or  
12 judicial staff of the COURT; and (b) CLASS COUNSEL, MEF’S COUNSEL, and any of their staff.”  
13 *Id.* According to the most recent information provided by the Claims Administrator, there are **1,682,023**  
14 members of the Class.

15 58. Each Settlement Class Member who timely files a claim will receive a Voucher  
16 redeemable at any Massage Envy franchised location for retail products, massage sessions,  
17 enhancements, and/or facials. Settlement Agreement at ¶ 11. The Vouchers will be fully transferrable  
18 and can be aggregated. *Id.* Settlement Class Members will have sixteen months from the date the  
19 Vouchers are issued to redeem their Vouchers. *Id.* However, a Voucher is not redeemable for cash and  
20 cannot be used to satisfy a Settlement Class Member’s monthly membership fees or used as a gratuity  
21 for services provided. *Id.*

22 59. The amount of the Voucher provided to each Settlement Class Member depends on two  
23 factors: (1) the aggregate amount of allegedly improper fee increase paid, and (2) the number of  
24 Settlement Class Members who submit a valid Voucher Request. Participating Settlement Class  
25 Members will receive: a \$10.00 Voucher if they paid \$75.00 or less in aggregate Fee Increases before  
26 the date of Preliminary Approval; a \$20.00 Voucher if they paid between \$75.01 and \$125.00 in  
27 aggregate Fee Increases before the date of Preliminary Approval; a \$30.00 Voucher if they paid between  
28 \$125.01 and \$175.00 in aggregate Fee Increases before the date of Preliminary Approval; a \$40.00

1 Voucher if they paid between \$175.01 and \$225.00 in aggregate Fee Increases before the date of  
2 Preliminary Approval; and a \$50.00 Voucher if they paid \$225.01 or more in Fee Increases before the  
3 date of Preliminary Approval. Should the total face value of all Vouchers to be issued be less than  
4 \$10,000,000, then participating Settlement Class Members will receive a *pro rata* increase to the value  
5 of their issued Voucher until \$10,000,000 is fully allocated.

6 60. The Settlement also provides for Injunctive Relief intended to prevent future injury to the  
7 Settlement Class. As a result of the Settlement, the Class Members' Membership Agreements, as well  
8 as the templates used for future Membership Agreements, to allow at least forty-five (45) days' advance  
9 written notice before any monthly fee increase takes effect. Agreement, at ¶¶ 14-15; *see also*  
10 Agreement at Exhibit 5 (for the proposed Membership Agreements). This is a substantial increase over  
11 the ten (10) days' notice purported provided in the older Membership Agreements. *See* Declaration of  
12 Jeffrey Krinsk [ECF No. 107], Exs. A-C. MEF will maintain this Injunctive Relief in force as a system  
13 standard for a period of not less than two (2) years following the Effective Date.

### 14 **III. ESTIMATED CLASS PARTICIPATION RATE AND RECOVERY**

15 61. As noted above, *Hahn* asserted that MEF improperly forfeited prepaid, but unused  
16 massages upon cancelation or termination of the Membership Agreement. *Hahn v. Massage Envy*  
17 *Franchising, LLC*, No. 3:12-cv-00153, 2014 WL 5099373, at \*2 (S.D. Cal. Apr. 15, 2014) (explaining  
18 the "gravamen" of *Hahn*). *Hahn* is analogous to this case for Settlement purposes. While the *Hahn*  
19 Settlement (and the related *Zizian* and *Bandell* Settlement) involved a different injury, it involved a  
20 similar class of consumers, namely Massage Envy members. Additionally, both this case and *Hahn*  
21 involve a similar type of recovery. *Hahn* granted class members additional massage services, while this  
22 Settlement proposes granting Vouchers for additional services and goods at Massage Envy franchised  
23 locations. Finally, the cases involved the adoption of a similar claims processes (class members were  
24 provided with a unique id code, which was used to electronically claim the massage and spa services on  
25 the settlement website) and used a similar claims administrator.

26 62. In the *Hahn* settlement, approximately 4.65% of the settlement class submitted a valid  
27 claim form and participated in the settlement. The *Hahn* settlement's participation rate is also in  
28 keeping with the experiences of other class settlements. *See Ferrington v. McAfee, Inc.*, No. 10-CV-

01455, 2012 WL 1156399, at \*4 (N.D. Cal. Apr. 6, 2012) (“the prevailing rule of thumb with respect to consumer class actions is 3–5 percent”); *see also Touhey v. United States*, No. EDCV 08–01418, 2011 WL 3179036, at \*7–8 (C.D. Cal. July 25, 2011) (finding a 2% response rate acceptable); *In re Cardizem Antitrust Litig.*, 218 F.R.D. 508, 526 (E.D. Mich. 2003) (finding favorable class reactions in a 6.9% response rate).

63. Currently, the Class is on pace for a similar participation rate as seen by the *Hahn* settlement. As of August 13, 2019, the Claims Administrator has received 58,477 Voucher claims (a **3.48%** claims rate). Based on these current numbers, if not further claims are made, Class Counsel estimates that Settlement Class Members will receive a Voucher in the amount between \$67.33 and \$336.67:

Fee Increase	Number of Claims	Minimum Voucher Amount	Pro-Rated Voucher Amount <sup>1</sup>
<b>\$75.00</b>	28,580	\$10	\$67.33
<b>\$75.01-125.00</b>	4,608	\$20	\$134.67
<b>\$125.01-175.00</b>	5,601	\$30	\$202.00
<b>\$175.01-225.00</b>	4,525	\$40	\$269.33
<b>\$225.01+</b>	15,163	\$50	\$336.67
	58,477		

Of course, these are only initial numbers. The claims period continues for another month (until September 20, 2019). A true and correct copy of August 13, 2019 Weekly Administration Report from the Claims Administrator is attached hereto as **Exhibit A**.

64. While each participating Settlement Class Member will receive, at minimum, a Voucher for \$10-50, if the current number of claims is increased proportionally, to approximate a 4.65% claims rate, each participating Class Member will receive a Voucher between **\$50.34** and **\$251.71** in value:

Fee Increase	Number of Claims	Estimated Additional Claims	Minimum Voucher Amount	Pro-Rated Voucher Amount <sup>2</sup>
<b>\$75.00</b>	28,580	9,647	\$10	\$50.34
<b>\$75.01-125.00</b>	4,608	1,555	\$20	\$100.69

<sup>1</sup> The aggregate Voucher amount estimated in these tables will be slightly below \$10,000,000 due to rounding error.

<b>\$125.01-175.00</b>	5,601	1,890	\$30	\$151.03
<b>\$175.01-225.00</b>	4,525	1,527	\$40	\$201.37
<b>\$225.01+</b>	15,163	5,118	\$50	\$251.71
	58,477	19,737		

The numbers in the table above were determined by subtracting the 58,477 (current number claims) from 78,214 (the estimated 4.65% claims multiplied by the number of Class Members 1,682,023) and then adding the resulting amount of additional claims to each “tranche” of recovery in the same ratio as reflected in the current claims.

65. Based on the information provided to Plaintiffs as part of the discovery from MEF’s Millennium Database, approximately 67% of the Class Members paid fee increases of \$75.00; approximately 11% paid fee increases of between \$75.01-125.00; approximately 8% paid fee increases of between \$125.01-175.00; approximately 7% paid fee increases of between \$175.01-225.00; and approximately 8% paid fee increases of \$225.01 or more. This distribution is similar to the current Voucher Request rate, in which 48.9% of the individuals paid fee increases up to \$75.00; approximately 7.9% paid fee increases of between \$75.01-125.00; approximately 9.6% paid fee increases of between \$125.01-175.00; approximately 7.7% paid fee increases of between \$175.01-225.00; and approximately 25.9% paid fee increases of \$225.01 or more. See Exhibit A. The Class Members paid median fee increases of between \$75.01-125.0.

66. The above represents a significant value for the Settlement Class. Based on Class Counsel’s calculations, it is estimated that those that had a fee increase of up to \$75.00 will receive a \$50.34 Voucher, those who paid a fee increase between \$75.01-125.00 will receive a \$100.69 Voucher, those who paid a fee increase between \$125.01-175.00 will receive a \$151.03 Voucher, and those who paid a fee increase who paid a fee increase between \$175.01-225.00 will receive a \$201.37 Voucher, while a fee increase of \$225.01 or more will receive a \$251.71 Voucher. When compared to the outstanding prospective liability, this represents approximately between a 67 and 89 percent recovery for each “tranche” of recovery.

67. Furthermore, these Vouchers allow purchases of a number of products and services at Massage Envy franchised locations, without requiring additional payment.

68. Massage Envy offers approximately 250 different products (351 products, if variations of

1 the same product are included), including skin care products, bath products, essential oils, candles, and  
 2 massagers. A list of products offered by Massage Envy franchised locations is attached hereto as  
 3 **Exhibit B** (filed under seal). A review of Massage Envy's sales offerings reveals that 69.7 percent of  
 4 these products (241 products) are sold for under \$50.34, 89.5 percent (314 products) are sold for under  
 5 \$100.69, 97.6 percent (339 products) are sold for under \$151.03, the same percent are sold for under  
 6 \$201.37, and 97.9 percent (340 products) are sold for under \$251.71.

7 69. Additionally, these are products that Class Members are actually purchasing. In 2018,  
 8 individuals purchased over \$43,000,000 in retail products from a Massage Envy franchised location. Of  
 9 these sales, 75 percent were under \$50.34, 98.4 percent were under \$100.69, and 100 percent were under  
 10 \$151.03 (the average estimated Voucher Amount).<sup>2</sup>

11 70. Massage Envy franchised locations also offer a number of services (where available) that  
 12 can be purchased with the Vouchers:

- 13 • A thirty-minute Total Body Stretch or Rapid Tension Relief Session ranges  
 14 between \$20 and \$46;
- 15 • A sixty-minute Massage, Healthy Skin Facial, or Total Body Stretch ranges  
 16 between \$40 and \$80 for a member or at the introductory price (between \$90 to \$120 for a non-  
 17 member, non-introductory pricing service);
- 18 • A ninety-minute Massage or Healthy Skin Facial ranges between \$60 and \$120  
 19 for a member or at the introductory price (between \$135 to \$180 for a non-member, non-  
 20 introductory pricing service).
- 21 • A sixty-minute Anti-Acne Back Facial ranges between \$52 and \$92 for a member  
 22 or at the introductory price (between \$102 to \$132 for a non-member, non-introductory  
 23 pricing service);
- 24 • A Microderm Infusion or Chemical Peel ranges between \$80 and \$140 for a  
 25 member or at the introductory price (between \$130 to \$180 for a non-member, non-introductory  
 26 pricing service).
- 27 • A thirty-minute minute Healthy Skin Facial Upgrade ranges between \$20 and  
 28 \$30;
- Enhanced Therapies (Aroma Therapy, CyMe Boosts, Exfoliating Lip Treatment,  
 Exfoliating Foot Treatment, Exfoliating Hand Treatment, Neck and Decollette Treatment, Anti-  
 Aging Eye Treatment, 10-min Percussion Therapy, or Enhanced Muscle Therapy are \$10); and

<sup>2</sup> The reviewed sales data includes products purchased on sale, with a discount, and offered on promotion. Accordingly, this data better reflects the pricing actually paid by consumers.

- Hot Stone Therapy (only available as an enhancement to 90-min session) is \$25.

1 The price variation is due to differences between pricing at different geographic regions (additionally,  
2 current members also pay discounted prices). Based on Counsel’s investigation of Massage Envy’s  
3 business practice, few (if any) individuals actually pay the non-member, non-introductory pricing.

4  
5 71. Moreover, discovery obtained during this lawsuit evidences that 48% percent of the  
6 putative Class were still Massage Envy members, while the remaining 52% are former members. Given  
7 their continued dealings with Massage Envy, it is likely that a significant portion of Settlement Class  
8 Members remain interested in the products and services offered at Massage Envy franchised locations.  
9 But even for those Class Members who have no interest in returning to a Massage Envy location, the  
10 Vouchers provided under the Settlement are fully transferable, and can be gifted or resold.

#### 11 **IV. ATTORNEYS’ FEES AND LITIGATION EXPENSES**

12 72. Class Counsel undertook this action on a contingent-fee basis, assuming significant risk  
13 that the action would yield no recovery and leave them uncompensated. From the outset of this action—  
14 November 4, 2016—Class Counsel has not been compensated for *any* time or expenses incurred.

15 73. Class Counsel understood it was embarking on a complex and expensive litigation with  
16 no guarantee of ever being compensated for the investment of time and money this case would require.  
17 In undertaking the responsibility of representing the Settlement Class, Class Counsel was obliged to  
18 ensure that sufficient resources were dedicated to the prosecution of this litigation and that funds were  
19 available to continuously compensate staff and cover the considerable costs that a case as this requires.  
20 With an average lag time of several years for class cases to conclude, the financial burden on contingent-  
21 fee counsel is far greater than on a firm that is paid on an ongoing basis. That is especially true in this  
22 case, which has been ongoing for approximately three years.

23 74. In addition, the aggressive litigation schedule, as well as the volume of discovery,  
24 research, and careful presentation of the law and facts to the Court, frequently necessitated an “all hands  
25 on deck” commitment by Class Counsel. Indeed, at points, several attorneys and staff at the firm  
26 worked on this matter almost exclusively, which significantly limited the ability to take on other matters  
27 at various times over the years.  
28

**A. Attorneys' Fees**

75. The information in this declaration regarding Class Counsel's time and expenses is taken from time and expense printouts and supporting documentation prepared and/or maintained by Class Counsel in the ordinary course of business. I am the partner who oversaw the day-to-day activities in the litigation and I reviewed these printouts in connection with the preparation of this declaration. The purpose of the review was to confirm both the accuracy of the entries on the printouts as well as the necessity for, and reasonableness of, the time committed to the litigation. I was aided in this process by Mark L. Knutson, a partner and the Chief Operating Officer at F&K when this case was initiated. While Mr. Knutson retired from the firm in 2017, he has remained active in the cases that were initially filed under his supervision.

76. The purpose of this review was to confirm both the accuracy of the entries on the printouts as well as the necessity for, and reasonableness of, the time committed to the litigation. As a result of this review, reductions were made to time in the exercise of "billing judgment."

77. As a result of this review and the adjustments made, I believe that the time reflected in the firm's lodestar calculation as set forth in this declaration is reasonable in amount and was necessary for the prosecution and resolution of this litigation. In addition, I believe that the fees incurred were all of a type that would normally be charged to a fee-paying client in the private legal marketplace. Class Counsel's rates and hours for this case, as of August 8, 2019, are as follows:

Staff Member	Position	Years of Experience	Time	Rate	Total
Jeffrey R. Krinsk	Partner	43	457.8	\$750.00	\$343,350.00
Mark L. Knutson	Of Counsel	32	538.1	\$700.00	\$376,670.00
Joshua C. Anaya*	Associate	10	2.4	\$500.00	\$1,200.00
David J. Harris	Associate	7	120.0	\$475.00	\$57,000.00
Trenton R. Kashima	Associate	6	1328.1	\$450.00	\$597,645.00
Lauren R. Presser*	Associate	4	424.3	\$425.00	\$180,327.50
A. Trent Ruark*	Associate	4	145.1	\$375.00	\$54,412.50
Siobhán E. Murillo	Law Clerk	n/a	77.3	\$150.00	\$11,595.00
Rebecka A. Gracia	Paralegal	n/a	89.7	\$150.00	\$13,455.00
Carol L. Grace	Office Manager	n/a	11.9	\$150.00	\$1,785.00
Shelby M. Ramsey	Paralegal	n/a	8.8	\$150.00	\$1,320.00
			<b>3203.5</b>	<b>\$511.55</b>	<b>\$1,638,760.00</b>

1 The total number of hours spent on this litigation by Class Counsel is 3203.5. The professionals at F&K  
2 have collectively spent a total of 3015.8 hours of attorney time, and 187.7 hours of litigation support  
3 time to this litigation. The lodestar amount for attorney/professional time based on Class Counsel's  
4 current rates is \$1,638,760. This number does not include the time to prepare the to-be-drafted Motion  
5 for Final Approval, its supporting declarations, and other post-application work, which in my experience  
6 will conservatively add at least 100 post-application hours.

7 78. Each of the attorneys employed by F&K on this case worked efficiently and diligently,  
8 and benefited from their past experience with complex litigation. I, Jeffrey Krinsk, am the Senior  
9 Attorney and Managing partner at F&K with over four decades of experience in business and class  
10 action litigation. Mark Knutson was a partner of F&K specializing in complex class action litigation for  
11 more than thirty years and is currently Of Counsel. Joshua C. Anaya, who left F&K in 2019, was an  
12 associate with approximately ten years of experience prosecuting consumer litigation. David J. Harris is  
13 a seventh year associate with extensive experience prosecuting class actions, including consumer class  
14 actions. Trenton R. Kashima is a sixth year associate who has prosecuted class actions exclusively  
15 during his career. Lauren R. Presser, who left F&K in 2018, was a fourth year associate with experience  
16 in complex business litigation. A. Trent Ruark, who left F&K in 2017, was a fourth year associate with  
17 experience in consumer litigation and complex financial transactions. See **Exhibit C** (detailing F&K  
18 attorney qualifications).

19 79. The hourly rates listed above are the usual and customary rates set by F&K for each  
20 individual. As confirmed by the *2016 Real RateReport® in Brief* by Wolters Kluwer and the *United*  
21 *States Consumer Law Attorney Fee Survey Report 2015-2016* (the "U.S. Consumer Law Survey"), these  
22 rates are similar to those charged by other attorneys in a similar practice. See **Exhibits D & E**,  
23 respectively.<sup>3</sup>

24 80. The *2016 Real RateReport* reflects the billing rates actually paid by clients. The Report

25 \_\_\_\_\_  
26 <sup>3</sup> I have attached an excerpt of the U.S. Consumer Law Survey to my declaration which only  
27 includes the relevant survey data for this District. However, the full report can be found at  
28 <https://www.nclc.org/images/pdf/litigation/tools/atty-fee-survey-2015-2016.pdf> (last accessed on August  
16, 2019).

1 indicates that in San Francisco partners billed, on average, \$595; associates billed \$400; and Paralegals  
2 billed \$172. *See* Exhibit D, at p. 5. The Report further notes that average billing rate for “Commercial,  
3 Litigation” in San Francisco was \$544. *Id.*

4 81. The U.S. Consumer Law Survey is an online, email, and telephone survey representing of  
5 4,500 members of the National Association of Consumer Advocates and other known attorneys  
6 practicing in the field of Consumer Law as identified through Avvo.com, Lawyers.com, and court filings  
7 around the country. *See* Exhibit E. Accordingly, the U.S. Consumer Law Survey more readily reflects  
8 the rates of attorneys within a similar practice area. The Survey found that the median billing rate for  
9 “Attorneys Handling Class Action Cases” in California is \$513. *Id.*, at p. 43. Additionally, for San  
10 Francisco, the survey found that attorneys’ rates generally ranged from \$350 (for the 25% Median  
11 Attorney Rate for All Attorneys) and \$725 (for the 95% Median Attorney Rate for All Attorneys). *Id.*,  
12 at p. 189.

13 82. These rates are also in keeping with the rates charged by firms which practice within this  
14 District. *See, e.g., Congdon v. Uber Techs., Inc.*, No. 16-CV-02499-YGR, 2019 WL 2327922, at \*6  
15 (N.D. Cal. May 31, 2019) (finding that hourly rates of between \$200 and \$750, in a national breach of  
16 contract/conversion class action, were reasonable) *citing In re MagSafe Apple Power Adapter Litig.*, No.  
17 5:09-cv-01911-EJD, 2015 WL 428105, at \*12 (N.D. Cal. Jan. 30, 2015) (“In the Bay Area, reasonable  
18 hourly rates for partners range from \$ 560 to \$ 800, for associates from \$ 285 to \$ 510[.]”); *In re High-*  
19 *Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at \*9 (N.D. Cal. Sept. 2,  
20 2015) (awarding partners rates “from about \$ 490 to \$ 975” and non-partners “from about \$ 310 to \$  
21 800”); *Banas v. Volcano Corp.*, No. 12-cv-01535-WHO, 2014 WL 7051682, at \*5 (N.D. Cal. 2014)  
22 (finding rates ranging from \$ 355 to \$ 1,095 per hour for partners and associates were within the range  
23 of prevailing rates).

24 83. The “blended rate” for Class Counsel over the course of this litigation is **\$511.55**  
25 (\$1,638,760.00 lodestar divided by 3203.5 hours). Attached as **Exhibit F** hereto, is a Categorized Hours  
26 and Lodestar chart breaking down F&K’s lodestar by work category—in total and for each F&K  
27 attorney and staff member—for each stage of this litigation from the inception of this litigation through  
28 August 8, 2019.

1  
2 **B. Litigation Expenses**

3 84. F&K's expenses and charges in connection with the prosecution of the litigation are  
4 \$85,417.14. Those expenses and charges are summarized in **Exhibit G** attached hereto. The following is  
5 information regarding these expenses:

6 • Transportation, Hotels and Meals: \$16,443.69. In connection with the prosecution  
7 of this case, F&K has paid for travel expenses to take or defend depositions, to meet with the  
8 mediator, and to meet with the opposing counsel.

9 • Photocopying: \$1,219.48. This represents costs exclusively paid to third-party  
10 vendors for copies provided to counsel in this case.

11 • Document Review, Hosting and Licenses: \$6,562.34. As agreed by the parties,  
12 documents and Electronically Stored Information was produced in large part by MEF in text-  
13 searchable TIFF images. To effectively and efficiently review these materials, F&K had to retain  
14 outside vendor, Inventus, to store and host the documents, code their meta-data for searchability,  
15 and acquire document review software licenses for Relativity. These charges were reasonably  
16 necessary as they allowed F&K to efficiently analyze discovery materials and minimize attorney  
17 review time relative to paper documents.

18 • Filing and Service of Process Fees: \$2,247.50. These expenses have been paid to  
19 this Court and others for filing fees and to attorney service firms or individuals for service of  
20 process, and subpoenas. These costs were necessary to the prosecution of the case.

21 • Court Hearing Transcripts and Deposition Reporting: \$6,024.60.

22 • Meditation: \$25,500.00. These expenses are the mediation fees for David  
23 Rotman, Esq.

24 • Claims Administration: \$26,724.74. This represents an anticipated cost<sup>4</sup> to email  
25 additional remainder notice regarding the Settlement to the Class. These expenses are due will be  
26 pay to Epiq Global, the Settlement Administration.

27 • Online Research Expenses: \$97.85. This represents the cost paid to Lexis Nexis  
28 for researching witnesses.

• Mail and Courier Expenses: \$596.94. This includes \$567.86 for courier and  
express delivery services and \$29.08 for U.S. Mail postage.

85. The expenses pertaining to this case are reflected in the books and records of this firm.  
See Exhibit G. These records are prepared from receipts, expense vouchers, check records, and other  
documents and are an accurate record of the expenses.

4 As the remainder notice cost has not yet be accrued, it is not listed in Exhibit G.

**V. APPROPRIATE INCENTIVE AWARDS FOR THE REPRESENTATIVES**

1 86. Plaintiffs Baerbel McKinney-Drobnis, Joseph B. Piccola, and Camille Berlese are  
2 requesting that the Court approve an incentive award of \$10,000 each (\$30,000 total). Based on my  
3 personal experience representing these three Plaintiffs during the course of the litigation, I believe that  
4 each one is deserving of the requested award.

5 87. Indeed, each Plaintiff has spent substantial amounts of time and energy assisting F&K in  
6 the prosecution of this action. Plaintiffs provided our firm with vital assistance in gathering facts  
7 relevant to their and other Class Members' potential claims. This included phone conversations,  
8 electronic correspondence, and face-to-face meetings to discuss the case.

9 88. Plaintiffs responded to extensive discovery requests from Defendant and collected  
10 documents responsive to those requests. Plaintiffs also were deposed by defense counsel, providing  
11 several hours of deposition testimony in support of their claims. At all times, Plaintiffs performed these  
12 crucial activities competently and acted in the best interests of absent class members.

13 89. Indeed, Mr. Piccola has kept records that indicate that he has spent in excess of 120 hours  
14 persecuting this case. This is not surprising, as Mr. Piccola has reviewed each document presented in  
15 this case and provided my office with significant feedback on Counsel's position. Based on my  
16 involvement in the case, I believe that each of the Plaintiffs made similar time commitments.

17 90. Additionally, each Plaintiff spent considerable time and effort protecting their family  
18 members and friends from Defendant's discovery requests in this case. Class Counsel understands that  
19 third-party discovery propounded on friends and family or litigants is invariably disruptive and is  
20 uncommon in a class action (which generally focuses on a defendant's actions). Such third-party  
21 discovery can cause reputational damage, an adverse risk associated with being named as a class  
22 representative for a class action.

23 91. It is my belief that the Settlement Class would not have obtained the outstanding results  
24 discussed above without the effort provided by the Plaintiffs in this action. At no small cost or risk to  
25 themselves, Plaintiffs engaged themselves at the forefront of a multi-year, federal litigation in order to  
26 not merely to obtain a few massages or a few hundred dollars, but—more importantly—to right a wrong.  
27 The substantial remedy obtained by Plaintiffs accrues to the benefit of thousands of individuals beyond  
28

1 themselves and their efforts are worthy of recognition.

2 I declare under penalty of perjury under the laws of the United States, that the forgoing  
3 statements made by me are true and correct.

4 Executed on August 16, 2019 in San Diego, California.

5  
6 s/ Jeffrey R. Krinsk  
Jeffrey R. Krinsk

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