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8 on behalf of himself and others similarly situated

9
10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF MERCED

12 MARCHE MEEKS, on behalf of himself
and others similarly situated,

13 Plaintiff,

14 v.

15 THE SHERWIN-WILLIAMS
COMPANY, an Ohio corporation,

16 Defendant.

Case No. 23CV-02082

[Assigned to the Honorable Brian McCabe]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

*[Filed concurrently with Declarations of Justin
Kachadoorian, Jeffrey Hansen, and Marche
Meeks, Proposed Order]*

Hearing Date: July 26, 2023

Time: 8:15 a.m.

Courtroom: 8

1 PLEASE TAKE NOTICE that, pursuant to Rule 3.769 of the California Rules of Court, on
2 July 26, 2023 at 8:15 a.m. in Courtroom 8 of the above-entitled Court, located at Old Merced
3 Courthouse, 627 W 21st Street, Merced, CA 95340, plaintiff Marche Meeks (“Plaintiff”) individually
4 and on behalf of a class of similarly situated individuals, will and hereby does move this Court for:

- 5 1. Preliminary approval of the proposed class Settlement of this lawsuit;
- 6 2. Pursuant to Section 382 of the California Code of Civil Procedure, provisional
7 certification of the following Settlement Class, for settlement purposes only, defined as follows:

8 **Settlement Class** - All persons who purchased products from a California
9 Sherwin-Williams store, or who purchased products online while in California,
10 between September 20, 2021 and January 31, 2022 and were charged a 4%
supply-chain surcharge; persons purchasing on a commercial account shall be
excluded from the class.

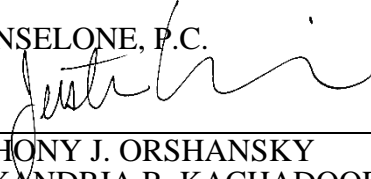
- 11 3. Preliminary appointment of Plaintiff as Settlement Class Representative;
- 12 4. Preliminary appointment of CounselOne, P.C. as Settlement Class Counsel;
- 13 5. The scheduling of a hearing to consider whether the Settlement should be finally
14 approved and whether to award amounts for the Class Representative Service Award, Settlement
15 Administrator costs, and attorneys’ fees and costs to Class Counsel;
- 16 6. Appointment of KCC LLC as the third-party Settlement Administrator for mailing
17 notices and disbursements to the Settlement Class; and
- 18 7. Approval of the proposed Class Notice and entry of the proposed Order instructing the
19 Class Notice to be disseminated and published to the Settlement Class as provided in the Settlement.

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1 This motion is based on this notice of motion, the attached memorandum of points and
2 authorities,¹ the declaration of Justin Kachadoorian, Jeffrey Hansen, and Marche Meeks, the pleadings
3 and other papers filed in this action, and on any further oral or documentary evidence or argument
4 presented at the time of hearing.

5 Dated: June 26, 2023

6 COUNSELONE, P.C.



7
8 ANTHONY J. ORSHANSKY
9 ALEXANDRIA R. KACHADOORIAN
10 JUSTIN KACHADOORIAN

11 Attorneys for Plaintiff
12 MARCHE MEEKS and the Class
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27 _____
28 ¹ Because this motion includes a motion for provisional class certification, the page limit for the attached memorandum is 20 pages. (See California Rule of Court 3.764(c)(2).)

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1 **I. INTRODUCTION**

2 Plaintiff Marche Meeks (“Plaintiff” or “Meeks”) moves the Court to preliminarily approve a
3 class action settlement with Defendant The Sherwin-Williams Company (“Sherwin-Williams” or
4 “Defendant”) that confers substantial relief on California consumers. The Settlement² between
5 Plaintiff and Defendant (collectively, the “Parties”), if approved, will resolve all claims asserted on
6 behalf of Plaintiff and Settlement Class Members in exchange for Defendant’s agreement to pay Four
7 Hundred Seventy Thousand Dollars (\$470,000) into a non-reversionary Settlement Fund that will be
8 available for distribution to Settlement Class Members who submit timely and valid Claim Forms.

9 This action arises from Sherwin-Williams charging California customers a 4% “Supply Chain
10 Surcharge” on purchases of certain products from September 20, 2021 until January 31, 2022
11 (“Surcharge Period”). Plaintiff alleges that Sherwin-Williams violated California law by failing to
12 include this supply-chain surcharge in the price of each item reflected on the shelf tags or displays or
13 on the items themselves. Plaintiff asserts claims on behalf of himself and a proposed class of
14 California customers who incurred the supply-chain surcharge.

15 After an exchange of information – including raw data consisting of every Settlement Class
16 Member transaction during the Surcharge Period – and extensive negotiations with the assistance of a
17 well-respected mediator, the Parties have reached a proposed class settlement to resolve the alleged
18 claims. The Settlement affords complete relief to the Settlement Class, as the data produced in this
19 action show that Sherwin-Williams charged Settlement Class Members approximately \$470,000 in
20 supply-chain surcharges; hence the Gross Settlement Amount of \$470,000 reflects 100% of the
21 damages and restitution sought in this action. This is an excellent result.

22 The Settlement is fair, reasonable, and adequate, and in the best interests of Settlement Class
23 Members. It provides substantial relief to Settlement Class Members in light of Sherwin-Williams’
24 numerous merit and procedural defenses in this case. Consequently, Plaintiff hereby moves for an
25 order: (1) conditionally certifying the Settlement Class for settlement purposes only; (2) granting
26

27 ² The Settlement Agreement (“Settlement Agreement” or “Settlement”) is attached to the Declaration of Justin
28 Kachadoorian, filed concurrently herewith, as Exhibit A. Unless otherwise noted, all capitalized terms used
herein are defined in the Settlement Agreement.

1 preliminary approval of the Settlement; (3) preliminarily appointing Plaintiff as Class Representative;
2 (4) preliminarily appointing Plaintiff’s counsel as Class Counsel solely for purposes of the Settlement;
3 (5) appointing KCC LLC as the Settlement Administrator; (6) approving the Class Notice and entry
4 of the proposed Order instructing the Class Notice to be distributed and published to the Settlement
5 Class; and (7) setting a hearing for final approval of the Settlement.

6 **II. SUMMARY OF THE LITIGATION**

7 **A. Discovery and Investigation**

8 On or around April 7, 2022, Plaintiff sent correspondence pursuant to the Consumers Legal
9 Remedies Act (CLRA), Cal. Civ. Code §§ 1750, *et seq.*, and a draft complaint to Defendant alleging
10 claims including violation of California Business & Professions Code section 17200, *et seq.* (Unfair
11 Competition Law), violation of California Business & Professions Code section 17500, *et seq.* (False
12 Advertising Law), violation of California’s Consumers Legal Remedies Act, California Civil Code §§
13 1750, *et seq.*, intentional misrepresentation, and negligent misrepresentation, all arising from
14 Defendant’s prior addition of a 4% supply-chain surcharge to certain items purchased by Defendant’s
15 customers in California from September 20, 2021 until January 31, 2022 (the “Surcharge Period”).

16 Sherwin-Williams is a manufacturer and retailer of paint. Sherwin-Williams sells a wide
17 variety of paint and related items at its retail stores throughout California and online to California
18 customers. Beginning in the fall of 2021, Sherwin-Williams added a “Supply Chain Surcharge” of
19 4% to certain items purchased by customers in Sherwin-Williams’s stores. Plaintiff alleges that
20 Sherwin-Williams did not include this surcharge in the price of each item reflected on the shelf tags
21 or displays or on the items themselves. (Complaint, ¶¶ 1-4.) Plaintiff alleges that the surcharge was
22 added at the point of sale, after the customer had already invested time and effort in selecting a product
23 and waiting to purchase it, and that the customer was not informed of the surcharge at the time of sale;
24 rather, the surcharge was added as a line item with the description on the receipt: “[E]ffective through
25 12-31-21, a 4% Supply Chain Surcharge has been added to all applicable items purchased.” (Sherwin-
26 Williams subsequently extended the surcharge through the end of January 2022.) (*Id.*, ¶¶ 5-6.)

27 Sherwin-Williams disputes and denies any wrongdoing, liability, culpability, negligence, or
28 violation of law whatsoever on its part, and denies that Plaintiff or the Settlement Class have suffered

1 any recoverable damages. Sherwin-Williams contends that it introduced the limited-time supply-chain
2 surcharge as a temporary measure in response to substantial increases in supply-chain costs, and that
3 it prominently and adequately disclosed the supply-chain surcharge to its customers through various
4 means, including by posting a sign at each checkout counter informing customers in English and
5 Spanish of the temporary surcharge. If this case proceeds in litigation, Sherwin-Williams intends to
6 assert numerous procedural and merits defenses to the Plaintiff's claims.

7 **B. Mediation and Settlement**

8 Throughout 2022 the Parties discussed and debated their positions, exchanged information
9 and documents, and ultimately agreed to explore resolution through private mediation.
10 (Kachadoorian Decl. ¶ 5.) On October 21, 2022, the Parties participated in a day-long mediation
11 before the Honorable Leo Papas (ret.), a well-regarded mediator who has mediated many class
12 actions. Prior to the October 21, 2022, mediation, Defendant provided Plaintiff with documentation
13 regarding the supply-chain surcharge, as well as raw data (excluding customer PII) for every
14 Settlement Class Member transaction; these data included the amount of sales Sherwin-Williams made
15 during the class period, the amount and number of surcharges collected, and the number of transactions
16 at issue. (Kachadoorian Decl. ¶ 5.) Counsel for the Parties conferred extensively concerning this
17 information, the merits of the Parties' claims and/or defenses, and other issues relevant to reaching a
18 settlement. Plaintiff consulted with an expert witness, who assisted Plaintiff to analyze the data
19 produced. (*See* Declaration of Jeffrey Hansen, filed herewith.) Plaintiff and his counsel conducted
20 sufficient discovery (informally) and analysis to evaluate the strengths and weaknesses of his
21 respective claims and Defendant's defenses to recommend this Settlement to the Class Members and
22 the Court. (*Id.*) Accordingly, the Parties were sufficiently familiar with the facts of this case and
23 intelligently evaluated them prior to settlement. The Parties reached a settlement in principle at the
24 October 21, 2022 mediation, and in the following months negotiated the terms reflected in the
25 Settlement Agreement.

26 The settlement negotiations were hard fought and conducted in good faith and at arm's length
27 between attorneys with substantial experience litigating class actions. Plaintiff and Defendant
28 recognized that the issues presented were likely only to be resolved with extensive and costly pretrial

1 proceedings and further litigation would cause inconvenience, distraction, disruption, delay, and
2 expense disproportionate to the potential benefits and taking into account the risk and uncertainty of
3 the outcome inherent in any litigation. The Settlement was the product of a process in which the
4 Parties each made significant compromises in the interest of reaching a full and complete settlement
5 of the action.

6 From Class Counsel’s review of the facts, strengths, and weaknesses of the case, the risks and
7 delays posed by further litigation, and Class Counsel’s own prior litigation experience, Class Counsel
8 believe that the recovery being made available to the Settlement Class is fair and reasonable taking
9 into consideration the amount obtained, the risks inherent in litigation of this genre, and the amount
10 offered in settlement. (*Id.* ¶ 8.)

11 **III. SUMMARY OF BASIC SETTLEMENT TERMS**

12 Under the terms of the Settlement, Defendant has agreed to pay a non-reversionary amount of
13 Four Hundred Seventy Thousand Dollars and Zero Cents (\$470,000), called the Gross Settlement
14 Amount or GSA, to settle the claims asserted in the action. (*See* Settlement Agreement ¶ 16.) The
15 GSA includes all settlement payments to Settlement Class Members who submit claims, the Class
16 Representative Service Award (up to \$7,500), attorneys’ fees to Class Counsel (up to \$200,000), and
17 reimbursement for litigation expenses (up to \$20,000), but excludes the costs of notice and settlement
18 administration, which Sherwin-Williams will pay separately from the Gross Settlement Amount.³ (*See*
19 *Kachadoorian Decl., Ex. A.*)

20 The Net Settlement Amount (“NSA”) is the amount remaining after the deductions for Class
21 Counsel’s fees and expenses and the Class Representative Service Award and will be distributed to
22 Authorized Claimants as follows:

23 **Authorized Claimants with Proof of Purchase:** Each Individual Settlement Payment will
24 consist of an amount up to all supply-chain surcharges actually paid by the Authorized Claimant in
25 Qualifying Transactions during the Surcharge Period (September 20, 2021 until January 31, 2022), as
26

27 ³ The proposed settlement administrator, KCC LLC, values the costs of notice and administration to be up to
28 \$120,425.00. (*See* “Administrator Services Estimate,” attached as **Exhibit B** to the Kachadoorian Declaration
filed herewith.)

1 evidenced by the Authorized Claimant’s receipt(s) or other proof of purchase showing the amount of
2 supply-chain surcharges paid. “Qualifying Transactions” means any purchases made at Defendant’s
3 stores in California or online while in California during the Surcharge Period. Authorized Claimants
4 may submit only one claim per Qualifying Transaction. If the total approved claims by Authorized
5 Claimants with proof of purchase exceeds the NSA, then the entire NSA will be distributed pro rata
6 to each such Authorized Claimant in proportion to the value of his or her claim. (Settlement
7 Agreement ¶ 17.A.)

8 **Authorized Claimants without Proof of Purchase:** Each Authorized Claimant who does not
9 have a receipt or other proof of purchase will be entitled to submit a claim for one (1) Individual
10 Settlement Payment of up to Ten Dollars and Zero Cents (\$10.00), based on the Authorized Claimant’s
11 confirmation of eligibility under penalty of perjury, and provided that funds remain in the NSA after
12 accounting for all Individual Settlement Payments to Authorized Claimants with proof of purchase.
13 The amount remaining in the NSA after accounting for the allocation of Individual Settlement
14 Payments to Authorized Claimants with proof of purchase shall be distributed in equal shares to
15 Authorized Claimants without proof of purchase up to \$10.00. (Settlement Agreement ¶ 17.B.)

16 **Cy Pres Distribution of Residual Funds:** Any amount remaining in the NSA that is not
17 claimed by Authorized Claimants will be distributed to the Justice Gap Fund of the State Bar of
18 California as the *cy pres* recipient, subject to Court approval. The Parties and their counsel do not
19 have an interest in this charitable organization. (Settlement Agreement ¶ 17.C.)

20 **Non-Monetary Relief:** As part of the Settlement Sherwin-Williams represents that it ceased
21 applying a supply-chain surcharge on California purchases as of February 1, 2022; and Sherwin-
22 Williams agrees that, if during the four years following final approval of the Settlement, Sherwin-
23 Williams were to charge to do-it-yourself customers making in-store purchases in Sherwin-Williams’
24 California stores a surcharge intended to compensate for increased supply-chain costs, Sherwin-
25 Williams would display the total price (before any relevant discount(s), taxes, or legally required
26 surcharges, fees, or expenses) on the shelf tag for each item to which the surcharge would apply.
27 (Settlement Agreement ¶ 18.)

28 ///

1 **IV. CERTIFICATION FOR SETTLEMENT PURPOSES IS APPROPRIATE.**

2 Plaintiff requests that the Court provisionally certify the Settlement Class for settlement
3 purposes only. (*See* Cal. Rules of Court, Rule 3.769(d) [“The court may make an order approving or
4 denying certification of a provisional settlement class after the preliminary settlement hearing.”].) Cal.
5 Code Civ. P. § 382 authorizes a class action where “the question is one of a common or general interest,
6 of many persons, or when the parties are numerous, and it is impracticable to bring them all before the
7 court.” “To obtain certification, a party must establish the existence of both an ascertainable class and
8 a well-defined community of interest among the class members.” (*Linder v. Thrifty Oil Co.* (2000) 23
9 Cal. 4th 429, 435, as modified Aug. 9, 2000.) “The community of interest requirement embodies three
10 factors: (1) predominant common questions of law or fact; (2) class representatives with claims or
11 defenses typical of the class; and (3) class representatives who can adequately represent the class.”
12 (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 470.) “In addition, the assessment of suitability
13 for class certification entails addressing whether a class action is superior to individual lawsuits or
14 alternative procedures for resolving the controversy.” (*Bufile v. Dollar Fin. Grp., Inc.* (2008) 162 Cal.
15 App. 4th 1193, 1204, disapproved of on other grounds by *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.
16 5th 955, 986 n.15.)

17 When certification is for settlement purposes only, California courts apply a “lesser standard
18 of scrutiny” to certification. (*Dunk*, 48 Cal. App. 4th 1974 (1986) 1802 n.19; *see also Luckey v.*
19 *Superior Court* (2014) 228 Cal. App. 4th 81, 93 [in the settlement context, “the court’s evaluation of
20 the certification issues is somewhat different from its consideration of certification issues when the
21 class action has not yet settled”].) This is because no trial is anticipated in the settlement-only context,
22 so the case management issues inherent in the ascertainable class determination need not be
23 confronted. (*Luckey*, 228 Cal. App. 4th at 93-94.) For the same reason, the trial court need not inquire
24 whether the case, if tried, would present intractable management problems because the proposal is that
25 there be no trial. (*See Amchem Prods. Inc. v. Windsor* (1997) 521 U.S. 591, 620.) Whether the class
26 should be provisionally certified is left to the Court’s discretion. (*See Wershba*, 91 Cal. App. 4th at
27 234-35.)

28 Plaintiff requests that the Court certify the following Settlement Class for settlement purposes

1 only:

2 All persons who purchased products from a California Sherwin-Williams store, or who
3 purchased products online while in California, between September 20, 2021 and
4 January 31, 2022 and were charged a 4% supply-chain surcharge; persons purchasing
on a commercial account shall be excluded from the class.⁴

5 Here, each requirement for class certification is met and certification of the Settlement Class
6 is warranted for the Settlement.⁵

7 **A. The Proposed Settlement Class Is Ascertainable and Numerous.**

8 Numerosity is satisfied if the class is so large that joinder of all members would be
9 impracticable. Cal. Code Civ. P. § 382. “No set number is required as a matter of law for the
10 maintenance of a class action” and classes of as few as 28 members have been certified. (*Rose v. City*
11 *of Hayward* (1981) 126 Cal. App. 3d 926, 934, disapproved of on other grounds by *Noel*, 7 Cal. 5th at
12 955.) Here, there are an estimated 70,469 Settlement Class Members in the Settlement Class.
13 (Kachadoorian Decl. ¶ 5.) Numerosity is satisfied.

14 As for ascertainability, one method of establishing an ascertainable class is by reference to a
15 defendant’s records where class members “may be readily identified without unreasonable expense or
16 time by reference to official records.” (*Noel*, 7 Cal. 5th at 986 n.15, citations omitted.) Here, many
17 of the Settlement Class Members are identifiable from Defendant’s records. (Settlement Agreement
18 ¶ 24.) Thus, the Class is ascertainable.

19 **B. The Community of Interest Requirements Are Met.**

20 The “community of interest” requirement involves three factors: “(1) predominant common

21 _____
22 ⁴ Those who made purchases on a commercial account are excluded from the proposed class because Sherwin-
Williams has additional, unique defenses as to a commercial-purchaser suit based on the supply-chain
23 surcharge, both on the merits and regarding class certification, which the instant class definition obviates. For
example, Sherwin-Williams asserts that many of its commercial customers received direct and targeted notice
24 of the surcharge. Moreover, Sherwin-Williams contends that many of its commercial customers have
particularized pricing contracts and arrangements, and so do not purport to rely on in-store price advertisements.
25 Thus, Plaintiff seeks to represent only non-commercial consumers for purposes of this Settlement.

26 ⁵ Since the provisional certification is for settlement purposes only and has been agreed to by Sherwin-Williams
for this basis, the Court need not consider Sherwin-Williams’ denial of Plaintiff’s allegations or Sherwin-
Williams’ legal arguments and defenses, including without limitation defenses to class certification and the
27 merits of the claims in the Action, all of which are reserved for Sherwin-Williams in the event that the
Settlement does not receive final approval or otherwise does not become effective.
28

1 questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3)
2 class representatives who can adequately represent the class.” (*Richmond*, 29 Cal.3d at 470; *Brinker*
3 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021.) Here, each element is met for purposes
4 of the Settlement.

5 **1) Common Questions Predominate**

6 First, “to determine whether common questions of fact predominate the trial court must
7 examine the issues framed by the pleadings and the law applicable to the causes of action alleged.”
8 (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal. App. 4th 908, 916.) “As a general rule if the
9 defendant’s liability can be determined by facts common to all members of the class, a class will be
10 certified even if the members must individually prove their damages.” (*Id.* at 916.) Here, Plaintiff
11 and Settlement Class Members all purchased items at Sherwin-Williams stores during the Surcharge
12 Period. Plaintiff contends that whether Sherwin-Williams’ addition of a supply-chain surcharge
13 violated California law is a question capable of resolution by common evidence. More importantly,
14 each Settlement Class Member’s entitlement to a claim under the Settlement is capable of resolution
15 through the class settlement administration process.

16 **2) Plaintiff’s Claims Are Typical**

17 Typicality is also met for purposes of settlement. “The test of typicality ‘is whether other
18 members have the same or similar injury, whether the action is based on conduct which is not unique
19 to the named plaintiffs, and whether other class members have been injured by the same course of
20 conduct.’” (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal. App. 4th 1497, 1509, quoting *Seastrom*
21 *v. Neways, Inc.* (2007) 149 Cal. App. 4th 1496, 1502.) Typicality requires that the named plaintiff’s
22 interests in the action be significantly similar to those of other class members. When the same
23 underlying conduct affects the named plaintiff and the class sought to be represented, the typicality
24 requirement is met irrespective of varying fact patterns that may underlie individual claims. (*See also*
25 *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 46 [“[I]t has never been the law in California that the
26 class representative must have identical interests with the class members.”].)

27 In this case, the Plaintiff has the same claims as the members of the Settlement Class and was
28 subjected to the same conduct by Defendant as the rest of the Settlement Class members: he purchased

1 items from Defendant’s retail store and was charged a supply-chain surcharge. By paying the supply-
2 chain surcharge, Plaintiff also suffered the same or similar injuries as the rest of the class members.

3 **3) Plaintiff and Plaintiff’s Counsel Can Adequately Represent the Class**

4 To satisfy the adequacy requirement, class representatives must establish that: (1) the
5 representative plaintiff and his counsel do not have any conflicts of interest with other class members,
6 and (2) the representative plaintiff and his counsel will prosecute the action vigorously on behalf of
7 the class. (*Janik v. Rudy, Exelrod & Zieff* (2014) 119 Cal. App. 4th 930, 944.) Here, Plaintiff has
8 committed to represent the interests of the Settlement Class and Plaintiff does not have any conflicts
9 with the Settlement Class. Plaintiff is a motivated and qualified class representative who has
10 participated throughout the process of investigation and settlement of the Settlement Class’s claims.
11 Plaintiff has engaged qualified counsel who are deeply experienced in complex class action litigation
12 as well as in negotiating and overseeing class action settlements. (Kachadoorian Decl. ¶¶ 26-29.)

13 **C. A Class Action Settlement Is the Superior Vehicle for Resolving This Matter.**

14 Finally, a class action is a superior method of resolving this matter through the class settlement
15 process. Superiority is satisfied if “the class action proceeding is superior to alternate means for a fair
16 and efficient adjudication of the litigation.” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34
17 Cal.4th 319, 332.) In a matter such as this, where the claims of all Settlement Class Members are
18 identical and are based on the same common core of facts, but involve a modest amount of damages,
19 resolving this matter as a class action settlement will achieve economies of time, effort, and expense,
20 and promote uniformity of results. (*See Basurco v. 21st Century Ins.* (2003) 108 Cal. App. 4th 110,
21 120-21.)

22 **V. THE TWO-STEP APPROVAL PROCESS**

23 Any settlement of class action litigation must be reviewed and approved by a court. This is
24 accomplished in two steps: (1) an early (preliminary) review by the trial court, and (2) a detailed
25 review after the notice has been distributed to the class members for their comments or objections. In
26 this regard, the Manual for Complex Litigation explains:

27 A two-step process is followed when considering class settlements...If the proposed
28 settlement appears to be the product of serious, informed, non-collusive negotiations,

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has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.

(Manual for Complex Litigation, Second (MCL 2nd), § 30.44.) The preliminary approval of the class action settlement by the trial court is simply a conditional finding that the settlement appears to be within the range of acceptable settlements. (See Newberg, § 11.25; *North County Contractor’s Assn., Inc. v. Touchstone Ins. Services* (1994) 27 Cal.App.4th 1085, 1094-1095; MCL 2nd, § 30.44 [“Preliminary approval is appropriate if the agreement is ‘fair, reasonable, and adequate under the circumstances’”].) A review of the preliminary approval criteria demonstrates a substantial basis for granting the preliminary approval requested by this Motion and proceeding to a full settlement hearing.

VI. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

As a matter of public policy, courts both encourage the use of the class action device and favor settlement over continued litigation. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434 [“Courts have long acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system.”]; *State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 471; *Class Plaintiffs v. City of Seattle* (1992) 955 F.2d 1268, 1276 [“[S]trong judicial policy...favors settlements, particularly where complex class action litigation is concerned.”]; Newberg, § 11.41. Settlement is favored, and settlement agreements are realistically assessed. (*Stamburgh v. Superior Court* (1976) 62 Cal.App.3d 231, 236; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447 [“The fact that plaintiff might have received more if the case had been fully litigated is no reason not to approve the settlement.”].)

The Settlement here is fair because it offers complete relief to the Settlement Class of the entire relevant surcharge amount collected, offers payment to each Settlement Class Member for releasing his or her claims, extinguishes the risk of litigation, and provides a fair and adequate distribution of the settlement proceeds. (Kachadoorian Decl., *passim*.)

A. The Settlement Is Entitled to a Presumption of Fairness.

Courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were

1 conducted in good faith. (Newberg, § 11.51; *Rodriguez v. West Publ. Corp.* (C.D. Cal. Aug. 10, 2007)
2 2007 U.S. Dist. LEXIS 74767, 24-25; *In re Chicken Antitrust Litigation* (N.D. Ga. 1980) 560 F. Supp.
3 957, 962; *Priddy v. Edelman* (6th Cir. 1989) 883 F.2d 438, 447; *Mars Steel Corp. v. Continental*
4 *Illinois National Bank and Trust Co.* (7th Cir. 1987) 834 F.2d 677, 681.)⁶ Courts do not substitute
5 their judgment for that of the settling parties, particularly when settlement has been reached by
6 experienced counsel familiar with the litigation. (*Rodriguez, supra*, 2007 U.S. Dist. LEXIS 74767 at
7 24.) The Settlement here is the result of extensive settlement negotiations between the Parties,
8 conducted at arm’s length, and informed by substantial factual and legal investigations.
9 (Kachadoorian Decl., *passim*.)

10 **1) Negotiations Were at Arm’s Length before an Experienced Mediator.**

11 On August 5, 2022, the Parties participated in a day-long mediation before the Honorable Leo
12 Papas (ret.), a well-regarded mediator who has mediated many class actions. (Kachadoorian Decl. ¶¶
13 5-7.) The settlement negotiations were hard fought, and the Settlement is the product of an adversarial,
14 non-collusive settlement process in which the Parties each made significant compromises in the
15 interest of reaching a full and complete settlement of the action. (*Ibid.*)

16 **2) Investigation Was Sufficient to Allow Counsel to Act Intelligently.**

17 Throughout this case, Class Members have been represented by experienced counsel who have
18 decades of experience in class action litigation in general and consumer litigation in particular. (*Id.* at
19 ¶¶ 26-29.) Class Counsel conducted a thorough investigation, including interviewing Plaintiff
20 regarding his experience; researching Defendant’s pricing practices; conducting investigations of
21 Defendant’s stores and website; reviewing advertising samples and photos provided by Defendant;
22 reviewing transaction data proved by Defendant; researching the experiences of other consumers in
23 California; discussing the alleged violations with defense counsel; meeting and conferring regarding
24 the information produced; researching legal issues; retaining an expert witness; analyzing data
25 produced by Defendant and preparing damages models; preparing for and attending mediation; and

26 _____
27 ⁶ It is well established that trial courts are “urged to follow the procedures prescribed in rule 23 of the Federal
28 Rules of Civil Procedure for conducting class actions.” (*Green v. Obledo* (1981) 29 Cal.3d 126, 145-146.)
Where appropriate, therefore, counsel cites Federal Rule of Civil Procedure 23 and federal case law interpreting
the same in addition to California statutory and case law.

1 negotiating and finalizing the Settlement and related documents. (*Id.* at ¶ 29.)

2 **3) Class Counsel Are Experienced in Similar Litigation.**

3 Class Counsel believe that the Settlement is fair and reasonable and serves the best interests of
4 the Class Members. (Kachadoorian Decl. ¶ 8.) Although the recommendations of counsel proposing
5 a class settlement are not conclusive, the Court can properly take the recommendations into account,
6 particularly if counsel have been involved in litigation for some period of time, appear to be competent,
7 have experience with this type of litigation, and sufficient discovery has been completed. (See
8 Newberg § 11.47.) Here, Plaintiff is represented by competent and experienced counsel who possess
9 extensive experience litigating consumer class actions and have been appointed as class counsel in
10 numerous consumer class actions. (Kachadoorian Decl. ¶¶ 26-29.)

11 **B. The Settlement Is Fair, Reasonable, and Adequate.**

12 To make a fairness determination, the Court should consider several factors, including “the
13 strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the
14 risk of maintaining class action status through trial, the amount offered in settlement, the extent of
15 discovery and the stage of proceedings, [and] the experience and views of counsel.” *Dunk v. Ford*
16 *Motor Co.* (1986) 48 Cal.App.4th 1794, 1801. “The list of factors is not exclusive and the court is
17 free to engage in a balancing and weighing of factors depending on the circumstance of each case.”
18 (*Wershba, supra*, 91 Cal. App. 4th 224, 245.) As discussed below, the proposed Settlement is fair,
19 adequate, and reasonable in light of the overall factors in this case.

20 **1) The Strength of Plaintiff’s Case**

21 Although Plaintiff steadfastly maintains that his claims are meritorious, he acknowledges that
22 there were substantial risks and uncertainty in proceeding with litigation, including with class
23 certification and trial. Defendant believes that it has solid defenses to Plaintiff’s claims, both on the
24 merits and with respect to class certification. (Kachadoorian Decl. ¶ 13.) Foremost, Defendant
25 contends that it gave customers notice of the supply-chain surcharge through store signage, including
26 at the register at checkout. (*Ibid.*) Defendant also asserts that many Settlement Class Members
27 received discounts on their purchases, including through customer-loyalty programs like PaintPerks,
28 that actually lowered the price they paid below that indicated on a shelf tag, even after accounting for

1 the addition of the surcharge. (*Ibid.*) Further, the PaintPerks terms and conditions contain an
2 arbitration agreement that prohibits class actions and requires individual arbitration, and Defendant
3 could have argued that customers who were members of PaintPerks are bound by arbitration clauses,
4 a point that Plaintiff disputed. (*Ibid.*)

5 Although Plaintiff was prepared to litigate such claims through class certification and,
6 ultimately, through trial, given the substantial amount offered in settlement, Plaintiff predicted that it
7 was unlikely he would recover an amount greater than the total value of the surcharges paid by
8 Settlement Class Members, which is what Defendant agreed to settle this action. (*Id.* at ¶ 14.) Thus,
9 this factor supports preliminary approval of the Settlement.

10 **2) Risk, Expense, Complexity, and Duration of Further Litigation**

11 Absent settlement, the Parties would have needed to conduct substantial additional discovery,
12 which may have included depositions of officers, managers, and consumers to determine, among other
13 things, Defendant’s decision-making, marketing, and pricing strategies in imposing the surcharge,
14 whether customers actually signed up for the PaintPerks program, and whether customers observed
15 any signage at Defendant’s stores or online, or otherwise were expressly made aware of the surcharge
16 prior to purchase. (Kachadoorian Decl. ¶ 13.) Discovery disputes would have been in the offing, and
17 the parties may have had to spend substantial additional amounts on expert witnesses for certification
18 and merits phases of the case. (*Ibid.*) Moreover, any favorable judgment could have been appealed
19 given the disputed issues in the case, especially in light of the fact that one of the primary statutes
20 under which Plaintiff sued has virtually no litigation history to guide the Court in determining liability
21 or relief. (*Ibid.*) Thus, this factor supports preliminary approval of the Settlement.

22 **3) Risk of Maintaining Class Action Status**

23 Settlement was reached prior to class certification and the result was a successful outcome for
24 the Settlement Class. Yet class certification was by no means a foregone conclusion; moreover, if
25 Plaintiff prevailed and certified a class action, there is no guarantee Defendant would not later move
26 for and obtain decertification. (Kachadoorian Decl. ¶ 16.) Defendant contended, among other things,
27 that the existence of arbitration agreements allegedly entered into by Settlement Class Members and
28 the fact that at least some Settlement Class Members received PaintPerks discounts threatened the

1 certifiability of this Action. (*Ibid.*) If the Court either denied class certification or later decertified it,
2 the Settlement Class would recover nothing, and Settlement Class Members would be forced to retain
3 their own counsel and proceed on the basis of small-dollar individual claims, only. Here, Settlement
4 Class Members are presented an opportunity to avoid those risks and receive monetary benefits,
5 thereby also weighing in favor of preliminary approval.

6 **4) Amount Offered in Settlement Given Realistic Value of Claims**

7 The Settlement provides a fair and reasonable monetary recovery for the Settlement Class in
8 the face of disputed claims. A settlement is not judged against what might have been recovered had a
9 plaintiff prevailed at trial, nor does the settlement have to provide 100 percent of the damages to be
10 fair and reasonable. (*Wershba, supra*, 91 Cal.App.4th 224, 246, 250 [acknowledging that
11 “[c]ompromise is inherent and necessary in the settlement process...even if the relief afforded by the
12 proposed settlement is substantially narrower than it would be if the suits were to be successfully
13 litigated, this is no bar to a class settlement because the public interest may indeed be served by a
14 voluntary settlement in which each side gives in the interest of avoiding litigation.”].) And though a
15 settlement need not “provide 100 percent of the damages to be fair and reasonable,” this Settlement
16 does precisely that.

17 Plaintiff principally seeks restitution of the supply-chain surcharge paid by Settlement Class
18 Members. Based on transactions data produced by Defendant, the total amount of supply-chain
19 surcharge collected from Settlement Class Members was approximately \$470,000. (Kachadoorian
20 Decl. ¶ 5.) Because the Gross Settlement Amount of \$470,000 is equivalent to the surcharged amount,
21 the Settlement provides full restitution of the amount of the surcharge and thus falls well within the
22 “ballpark” of reasonableness under *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116,
23 123.

24 **VII. PROPOSED NOTICE PROVIDES ADEQUATE NOTICE TO THE SETTLEMENT**
25 **CLASS.**

26 This Court should order distribution of the Class Notice to the Settlement Class, which is
27 attached to the Settlement Agreement as Exhibits 1-3, and 5. The content of the notice satisfies
28 California Rule of Court 3.766(d) because it advises Settlement Class Members of the nature of the

1 claims, basic contentions and denials of the Parties, the key terms of the Settlement, the uniform
2 deadline to submit a Claim Form, opt out, or object to the Settlement and the procedure by which to
3 do so. (Settlement Agreement ¶¶ 24-33.) The Class Notice will also notify Settlement Class Members
4 of the final approval hearing date, provide the contact information for Class Counsel, and advise
5 objecting Settlement Class Members that they may enter an appearance through counsel if they wish.
6 (*Ibid.*)

7 The Class Notice will be sent by email to each Settlement Class Member for whom Defendant
8 has an email address. (Settlement Agreement ¶ 27.) For any Settlement Class Member for whom
9 Defendant has a mailing address and to whom the Email Class Notice was returned undeliverable or
10 for whom email address information was unavailable, the Settlement Administrator will send a
11 postcard notice. (*Ibid.*) Any mailed notices returned to the Settlement Administrator as non-delivered
12 will be skip-traced and re-mailed. (Settlement Agreement ¶ 31.)

13 This direct notice will be supplemented with an online media notice campaign consisting of
14 banner advertisements that will be displayed on internet websites and in mobile applications. The
15 Settlement Administrator will target the banner advertisements to display in California to an audience
16 most likely to include Settlement Class Members, for example, those who have demonstrated an
17 interest in do-it-yourself or home-improvement projects. The online media notice campaign shall
18 extend the duration of the Claims Period. (*Id.* at ¶ 28.A.) Direct notice will also be supplemented
19 through Publication Notice, substantially in the form attached as Exhibit 5 to the Settlement
20 Agreement, which shall appear in the California regional editions of the USA Today once a week for
21 four successive weeks, in accordance with Cal. Civ. Code § 1781(d) and Cal. Gov. Code § 6064. (*Id.*
22 at ¶ 28.B.)

23 This manner of giving notice is the “best notice practicable” under the circumstances because
24 it provides “individual notice to all members who can be identified through reasonable effort.” *Eisen*
25 *v. Carlisle and Jacqueline* (1974) 417 U.S. 156, 173. It also satisfies California Rule of Court 3.766(e)
26 as the most reliable and cost-effective method of reaching Settlement Class Members.

27 The Parties propose that the Settlement be administered by KCC LLC, an experienced class
28

1 action settlement administrator.⁷ The Settlement Administrator will create and maintain a website
2 posting information about the Settlement, including the long-form Class Notice, and allowing for the
3 submission of electronic Claim Forms, though the Settlement Administrator shall also accept Claim
4 Forms submitted by mail postmarked no later than the Claim Deadline to the address provided on the
5 settlement website and in the Class Notice. (Settlement Agreement ¶ 29)

6 Settlement Class Members shall have forty-five (45) calendar days from the date the Settlement
7 Administrator originally emails the Class Notice (or mails it to those whom Defendant has physical
8 addresses and email notice is undeliverable) to submit a Claim Form or request exclusion from, or
9 object, to the Settlement. (Settlement Agreement ¶¶ 34, 36, 37.)

10 **VIII. THE COURT SHOULD SET A FINAL APPROVAL HEARING**

11 Finally, this Court should set a hearing for final approval of the Settlement on a date
12 appropriately scheduled to follow the Claims Deadline. (California Rule of Court 3.769.)

13 **IX. CONCLUSION**

14 Based upon the foregoing, and because the proposed Settlement is fair, reasonable, and
15 advantageous to the Settlement Class Members, Plaintiff respectfully requests that the Court enter an
16 Order:

- 17 1. Preliminarily approving the Settlement as fair, reasonable, and adequate;
- 18 2. Preliminarily approving the form and content of the Class Notice;
- 19 3. Provisionally certifying the Settlement Class under Cal. Civ. Code section 382 for
20 settlement purposes only;
- 21 4. Approving and appointing Plaintiff as the Class Representative;
- 22 5. Approving and appointing CounselOne, P.C. as Class Counsel;
- 23 6. Approving and appointing KCC LLC as the Settlement Administrator;
- 24 7. Ordering the implementation of the Class Notice plan as set forth in the Settlement
25 Agreement;
- 26 8. Setting a date for the Final Approval Hearing; and

27 _____
28 ⁷ The bid from KCC itemizing the services to be provided and the cost thereof is attached to the Kachadoorian Declaration as Exhibit B.

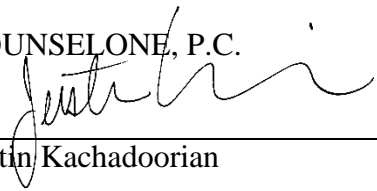
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9. Any further relief the Court deems just and proper.

Respectfully submitted,

COUNSELONE, PC

Dated: June 26, 2023

COUNSELONE, P.C.

Justin Kachadoorian

Attorneys for Plaintiff and the Putative Class