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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

MARKO DJORIC, an individual, on behalf of himself and all others similarly situated,

Plaintiff,

v.

JUSTIN BRANDS, INC.; and DOES 1 through 10, inclusive.

Defendants.

Case No. BC574927

CLASS ACTION

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: July 31, 2018
Time: 9:00 a.m.
Dept.: SSC, Dept. 17

Assigned to: Hon. Maren Nelson
Action Filed: March 12, 2015
Trial Date: Not set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on July 31, 2018, at 9:00 a.m. in Department 17 of the Los Angeles Superior Court, 312 North Spring Street, Los Angeles, California 90012, before the Honorable Maren Nelson, Plaintiff Marko Djoric ("Plaintiff") will and hereby does move for final approval of the class settlement with Defendant Justin Brands, Inc. ("Defendant") pursuant to California Rules of Court, Rule 3.769.

The parties bring this motion on the grounds that they have participated in arms-length negotiations and arrived at a settlement which is fair, reasonable, and adequate and which should be finally approved.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support of the Motion, the authorities cited therein and the supporting declarations, oral argument of counsel, and any other matter that may be submitted at the hearing.

DATED: July 9, 2018

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By: 
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MEMORANDUM OF POINTS AND AUTHORITIES

In accordance with California Rules of Court (CRC), Rule 3.769, Plaintiff Marko Djoric ("Plaintiff") respectfully presents his Memorandum of Points and Authorities in Support of final approval of this class action against defendant Justin Brands, Inc. ("Defendant").

I. INTRODUCTION

On March 12, 2018, this Court preliminarily approved the class action settlement of this action. Plaintiff now seeks final approval. In conformance with the Court's Order granting preliminary approval, notice to the Class commenced on March 30, 2018. (Declaration of Jennifer M. Keogh ("Keogh Decl."), ¶6.) Nothing has occurred since preliminary approval to undermine the validity of the Court's previous finding that the settlement appears to be fair, adequate, and reasonable. Quite the contrary, after an extensive notice campaign, over 24,000 claims have already[1] been received (Keogh Decl., ¶22),[2] and to date, no class member has opted out or challenged the settlement.[3] Overall, in addition to the expansive injunctive relief that the parties negotiated, if all claims are valid, California consumers will receive in excess of $1.1 million in direct monetary relief as a result of this class action settlement.

The settlement agreement ("Agreement") executed by the parties contemplates the release of the class claims alleged in this case and no more. (See Ex. 1 ("Agreement") to Declaration of Gretchen Carpenter, ("Carpenter Decl.").) In exchange for the release, the Agreement provides substantial relief to Class members who submit valid claims to the settlement administrator and significant injunctive relief throughout California. (Agreement, 7:6-10:11.) Defendant will separately pay for the costs and expenses of the settlement, and the costs and attorneys' fees from the litigation, as well as any incentive fee to Plaintiff, as awarded by the Court. (*Id*., 14:16-19.) In exchange, the Class releases the class claims against Defendant. (Agreement, 16:26-18:9)

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[1] The last day to make a claim is not until September 7, 2018, so even more claims are likely to be submitted before the deadline.

[2] The claims administrator is investigating and may seek more information with respect to 16,886 of these claims, leaving at least 7,230 valid claims, for a total of 13,057 pairs of Chippewa boots.

[3] Plaintiff does note however that the last day to object or opt-out is not until July 9, 2018, the date this Motion is due. As set forth in the Settlement Agreement, Plaintiff will respond to any objections in a separate filing on or before July 16, 2018.

"The settlement of a class action requires court approval to prevent fraud, collusion, or unfairness to the class." (*In re Cellphone Termination Fee Cases* (2009)180 Cal.App.4th 1110, 1117 [citation omitted] (*In re Cellphone*).) "The court must determine the settlement is fair, adequate, and reasonable. The purpose of [this] requirement is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." (*Ibid*. [citation, punctuation omitted].) "The court has a fiduciary responsibility as guardian of the rights of the absentee class members when deciding whether to approve a settlement agreement.'" (*Ibid*.)

The proposed settlement and resulting Agreement was achieved after numerous, arms-length and, at times, heated negotiations. It falls well within the range of reasonableness for approval under California law and is precisely the type of case recognized as ideally suited for class adjudication in that it involves a large number of individually small claims. It adequately and fairly compensates the members of the Class, who would likely never otherwise have their injuries addressed, by providing for the certification of a Settlement Class, providing real compensation to Class members in the form of their choosing, including significant monetary relief, and a release of Class claims. Further, the proposed settlement contains substantial injunctive relief guaranteeing that the unlawful conduct will be rectified and will not be repeated in the future. As discussed more fully below, the proposed settlement warrants approval.

II. SUMMARY OF THE LITIGATION

A. The Factual and Procedural Background of the Litigation

In July 2012, Mr. Djoric, an immigrant to this country who now takes pride in being an American, purchased a pair of Chippewa Men's 8-Inch Black Motorcycle Steel Toe Boots online from the Working Person's Store.[4] The boots were expensive; they cost nearly $300.00. But Mr. Djoric purchased the Chippewa boots, as opposed to a comparable but less expensive pair of a different brand, because he believed them, based on Defendant's marketing and representations, such as "handcrafted in the USA," to be manufactured in the United States.

In August 2012, while wearing his Chippewa boots, Mr. Djoric had a serious motorcycle

[4] The facts are set forth in the concurrently filed Declaration of Marko Djoric.

accident which caused him extensive bodily injury. Thereafter, in October 2012, Mr. Djoric purchased a second pair of Chippewa boots to replace the pair damaged in his accident. In June 2014, Mr. Djoric decided to frame one of the Chippewa boots he was wearing at the time of his 2012 accident, which required him to cut the boot apart. In doing so, Mr. Djoric discovered that the boots' upper, which comprised a substantial portion of the boots, was stamped "MADE IN CHINA."

On March 12, 2015, Mr. Djoric filed the instant class action complaint alleging violations of the UCL, the CLRA, and the FAL. Several months later, on October 15, 2015, Defendant filed its Answer to the Complaint.

On January 25, 2016, Defendant served an Offer to Compromise pursuant to Code of Civil Procedure section 998. (Carpenter Decl., ¶3.) On February 24, 2016, Plaintiff rejected this offer as inappropriate and insufficient in the context of the instant class action matter. (Id.)

Over the course of the litigation, Plaintiff served extensive and hard-fought written discovery. Plaintiff served multiple sets of Requests for Admissions, Requests for Production, Form Interrogatories, and Special Interrogatories and deposed Defendant's corporate designee. (Carpenter Decl., ¶4.) The parties encountered numerous disagreements with respect to the scope of discovery, and Plaintiff was forced to utilize the Court's Informal Discovery Conference procedures. In the end, through the contentious discovery process and the exchange of information negotiated during settlement discussions, Plaintiff was successful in identifying each of the boot models which were at issue, the volume of products distributed in California, and thus, the relative size of the Class. (Id.)

On August 15, 2016, Plaintiff filed his Motion for Class Certification.[5] On October 26, 2016, the parties attended the first of two in-person settlement conferences with Ralph Williams, a private mediator. (Carpenter Decl., ¶6.) The parties made progress at this first session of mediation but were unable to resolve the matter. On November 8, 2016, the parties attended

[5] In an effort to provide the parties with more time and flexibility to reach an agreement, Plaintiff continued the hearing on his pending Motion for Class Certification. (Carpenter Decl. ¶5.) Accordingly, the Motion for Class Certification has never been ruled upon. (Id.)

another settlement conference after an exchange of some mediator directed information. (Id.) At this second session, the parties were able to reach an agreement with respect to some, but not all, of the terms of the settlement. (Id.) Finally, with the on-going assistance of the mediator, the parties eventually reached agreement on a comprehensive resolution of this action and on June 30, 2017, the initial Settlement Agreement was executed by the parties.

On July 21, 2017, the parties filed their first Motion for Preliminary Approval. (Carpenter Decl., ¶7.) On August 10, 2017, the Court issued an order postponing the hearing on the Motion until January 24, 2018, and on August 11, 2017, the Court issued an order requesting further clarification with regard to certain terms of the Agreement. (Id..)

In November, 2017, the parties signed a slightly revised Settlement Agreement, and on January 10, 2018, the parties submitted the requested supplemental information to the Court. On January 24, 2018, the parties appeared before the Court to discuss the details of the Agreement and Preliminary Approval. (Carpenter Decl., ¶8.) At that hearing, the Court asked the parties to explore the possibility of expanding the proposed notice program. (Id.) The parties took the Court's suggestions and on March 2 and 8, 2018 filed supplemental papers describing the expanded notice plan with the Court. (Id.) This Court held a further hearing on March 12, 2018, and entered the Preliminary Approval Order that same day. (Id.) On March 13, 2018, Plaintiff filed the fully executed final Settlement Agreement with the Court.

As set forth in the Declaration of Jennifer Keough, the notice plan was subsequently implemented, and submission of claims has commenced.

B. Legal Basis for Plaintiff's Claims and the Claims of the Class

Plaintiff's suit alleges that Defendant cheated California consumers, such as Mr. Djoric, by misrepresenting the origin of its boots as "handcrafted" or otherwise made in the USA when, in fact, significant portions of the boots were made in foreign countries. The law in California with respect to the labeling of a product's country of origin is clear:

> It is unlawful for any ... corporation... to sell or offer for sale in this state any merchandise ... [with] the words "Made in the U.S.A.," "Made in America," 'U.S.A.," or similar words if the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.

Bus. & Prof. Code § 17533.7(a). *See also* Civ. Code § 1770(a)(4) ("The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful: . . . Using deceptive representations or designations of geographic origin in connection with goods or services."). *See e.g., Colgan v. Leatherman* (2006) 135 Cal.App.4th 663, 684.

Defendant denied and continues to deny Plaintiff's allegations. (Agreement, 1:22-24.). Nonetheless, the parties were able to agree upon the proposed Settlement.

III. SUMMARY OF THE SETTLEMENT

A. The Settlement Class

For the purposes of this Motion, Defendant does not contest that this action should be provisionally certified as a class action. (Agreement, 6:26-7:1.) The Agreement proposes the following narrowly defined and readily ascertainable Settlement Class: all California persons who made a "Qualifying Transaction", *i.e.*, "a purchase in California (including an online purchase made while the purchaser is in California)" of one of the identified Chippewa Products[6] within the Class period of March 2011 through June 30, 2017. (Agreement, 5:21-23; 6:9-13.) Excluded from the Settlement Class are all persons who are employees, officers, agents, and representatives of Defendant and its subsidiaries and affiliates, as well as all mediators, judges, and judicial staff who have presided over this action, and all persons who have timely opted out or have been properly excluded. (Agreement, 6:10-13.)

B. Terms of the Settlement

If approved, the proposed settlement, which is detailed fully in the Settlement Agreement, will result in a dismissal of this action, the conveyance of substantial monetary value to the Settlement Class, and significant injunctive relief.

Direct Relief to the Class: Election Between Cash Benefit and Promotional Code: In return for a full settlement of their claims, all Settlement Class Members who timely submit a fully executed Claim Form (Ex. E to the Agreement), at the Class Member's option, will receive either: (1) a Cash Benefit in the amount of $25.00 for each Chippewa Product claimed, or (2) a

[6] Attached as Exhibit D to the Agreement is a list of the 394 mislabeled boot models at issue.

$50.00 Promotional Code for each Chippewa Product claimed. Cash Benefits and Promotional Codes shall be distributed to Qualifying Claimants within thirty (30) days of the Effective Date of the Settlement Agreement. (Agreement, 7:6-14.) These settlement benefits are fully transferable, the Promotional Codes will be valid for two years, multiple Promotional Codes can be used per transaction, and no receipt or other proof of purchase will be required for Class members to obtain these benefits. (Agreement, 5:16-20.)

The parties negotiated, and the Court preliminarily approved, this claims-made settlement given that Defendant does not have records of the identities of the great majority of Class members who purchased their boots at brick and mortar stores or on third party websites and thus, cannot provide direct refunds to all Class members in this case.[7] However, the requirements for making a claim are minimal and do not require a receipt or any proof of purchase, thereby encouraging substantial participation. (Agreement, 12:10-28.) This approach has been extremely successful and, assuming the validity of all claims made, a 58% claims rate has been achieved thus far (and there are still almost two months remaining in the claims period), a result which is already substantially higher than the average claims rate.[8] *See, e.g.*, *Couser v. Comenity Bank* (S.D. Cal. 2015) 125 F.Supp.3d 1034, 1044 (noting that a claims rate of 7.7% was higher than average).

Injunctive Relief: Another critical element of the Settlement is the substantial negotiated injunctive relief. Again, the specifics of the injunctive relief are detailed fully in the Settlement Agreement. However, the most pertinent provisions, which must be implemented no later than April 9, 2019 per the Settlement but which have already been completed, are highlighted below. (Agreement, 7:15-10:11.) Defendant agreed to:

1. Maintain the changes Defendant instituted as result of this litigation in or about March 2016 to its Chippewa Products and their marketing, advertising, and promotional materials, including revision of Defendant's country of origin

[7] In fact, for most of the Class period, Defendant did not even sell its boots on its own website.

[8] Even if only 7,230 claims for 13,057 products are ultimately determined to be valid, the claims rate is still over 17 percent.

representations and use of the United States flag without qualifying language, to comply with California law, including but not limited to Business & Professions Code § 17533.7. This injunctive relief will become effective as part of the Judgment on the Effective Date and will remain in effect for five years, unless new or amended federal or California laws expressly allow or require further changes. In either case Defendant expressly agrees to conform its marketing, advertising, and promotional materials to such additional or different requirements imposed by subsequent law. (Agreement, 7:16-26.)

2. Publish a corrective announcement on the home page of Defendant's website (www.chippewaboots.com), disclosing that the Chippewa Products include parts that are manufactured outside the United States, and including a link to a web page that lists the specific Chippewa Products affected. The announcement will contain the agreed upon language specified in the Settlement Agreement. The announcement will remain on the homepage of Defendant's website for at least six (6) months. (Agreement, 7:27-8:11.)
3. Publish a corrective announcement in 21 California newspapers disclosing that the Chippewa Products include parts that are manufactured outside the United States. (Agreement, 8:12-15.)
4. Notify in writing all known parties who sell, distribute, or market the Chippewa brand boots in California, including online retailers outside of California who sell to California residents, that although the boots were advertised as "Handcrafted in the U.S.A.," they include parts that were manufactured outside the United States, and providing a list of specific boot models affected. (Agreement, 8:22-26.)
5. Instruct in writing and require all known parties who sell, distribute or market Chippewa brand boots in California, including online retailers outside of California who sell to California residents, to conform their advertising language to California residents as negotiated and to only represent that Chippewa Products are "Handcrafted in the U.S.A." when using the additional representation that the boots

include parts that are manufactured outside the United States. Defendant shall instruct such retailers to use the language "Assembled in the USA with imported parts" and/or "Handcrafted in the USA with imported materials," or substantially similar language referencing the use of imported parts and materials. Defendant shall provide retailers with explicit instruction with regard to the change of language as negotiated. (Agreement, 8:27-9:12.)

6. Only advertise for Chippewa boots using a United States flag by further representing in the flag logo itself that the boots include parts that are manufactured outside the United States, such as the flag currently being used by Defendant, which includes the following language in the flag logo itself: "Assembled in the USA with imported parts" or "Handcrafted in the USA with imported materials." (Agreement, 9:13-18.)
7. Return to Defendant, at Defendant's expense, all the retailer's current inventory of Chippewa boots that have the "Handcrafted in the U.S.A." logo embossed in leather on the boots. (Agreement, 9:19-21.)
8. Return to Defendant, at Defendant's expense, or destroy all marketing and packaging materials that advertise the boots as "Handcrafted in the U.S.A." without further representing that the boots include parts that are manufactured outside the United States. (Agreement, 9:22-25.)
9. Destroy all marketing and packaging materials that advertise the boots with a United States flag which do not further represent in the flag logo itself that the boots include parts that are manufactured outside the United States. (Agreement, 9:26-10:1.)

C. Class Notice

The parties worked hard to negotiate a robust, expanded notice plan that would both satisfy the Court and maximize the likelihood of reaching potential Class members. The resulting plan exceeds the scope of notice typically provided in similar consumer actions. Specifically, the notice plan provided for:

(a) Publication in twenty-one (21) newspapers throughout California both in print and in their online versions. (Agreement, Exh. F.)

(b) Publication of the Corrective Notice, which is part of the injunctive relief component of the settlement, will also be expanded to the same 21 newspapers.

(c) A digital media campaign utilizing the Google Display Network which resulted in 4 million impressions of the banner notice (included in Exhibit A to the Agreement) during the designated time period.

(d) Publication of the Summary Notice, included in Exhibit A to the Agreement, in the June 2018 California version of the magazine Popular Mechanics, which went on sale May 15; and

(e) An in-store Notice component wherein each of Chippewa's authorized California brick & mortar stores was provided with a notice regarding the litigation to be displayed at the cash register. (Agreement, 11:12-16.)

In addition, the claims administrator established a website at http://www.ChippewaMadeinUSASettlement.com to provide the Class with further information about this lawsuit and Settlement. (Preliminary Approval Order ("PAO"), 17:9.)

D. This approved notice procedure constitutes the best notice practicable under the circumstances

The notice constituted the best notice practicable under the circumstances and effectuated due and sufficient notice to the Class, not only of the proposed Settlement Agreement terms but also of all the appropriate dates and procedures for opting out, objecting to the Settlement, and/or appearing at the final approval hearing. *See* Rule 3.769(f) ("If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.") The notice is thus "adequate to 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the]

proceedings." (*7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.App.4th 1164 (2000) (citation omitted)). Further, as required, the notice is neutral as to the merits of the proposed Settlement. As evidenced by the fact that more than 24,117 Class members have made claims thus far, the notice plan was more than adequate.

E. The Proposed Release.

The proposed release was extensively negotiated, edited in accordance with notes from the Court, and is properly limited to matters pled and investigated in the litigation. It does not in any way disadvantage Class members. Specifically, the release by Class members provides:

> In addition to the effect of any final judgment entered in accordance with this Settlement Agreement, upon this Settlement becoming final, Defendant and the Released Persons will be released and forever discharged from any and all actions, claims, demands, rights, suits, Settlement Agreement and causes of action of any kind or nature whatsoever against the Released Persons, including damages, costs, expenses, penalties, and attorneys' fees, whether at law or equity, known or unknown, foreseen or unforeseen, developed or undeveloped, direct, indirect or consequential, liquidated or unliquidated, arising under common law, regulatory law, statutory law, or otherwise, based on federal, state, or local law, statute, ordinance, regulation, code, contract, common law, or any other source, or any claim that Plaintiff or Settlement Class Members ever had, now have, may have, or hereafter can, shall or may ever have against the Released Persons in any court, tribunal, arbitration panel, commission, agency or before any governmental and/or administrative body, or any other adjudicatory body, on the basis of, connected with, arising from or in any way whatsoever relating to actions or omissions in manufacturing, advertising, marketing, labeling, packaging, promotion, selling and distribution of Chippewa Products with a "Handcrafted in USA" or equivalent country of origin label, from March 1, 2011 to June 30, 2017, including those which have been asserted or which could reasonably have been asserted by the Settlement Class Members against Defendant in this Action or any other threatened or pending litigation asserting claims of the nature encompassed by this release, and any claims asserted after the date of final approval. This release is limited to claims that arose or could have been asserted based on labels or marketing in existence as of the date of final approval of the Settlement Agreement, and excludes any claims for personal injury.

F. Requested Attorney's Fees Payment and Incentive Award

In accordance with the Agreement and this Court's PAO, filed concurrently herewith is Plaintiff's counsel'smotion for attorney's fees and costs as well as for an incentive fee for Mr. Djoric for serving as the class representative.

The request for fees has no bearing on the benefit achieved for the members of the Class. Only after a settlement was reached and relief negotiated for the Class, did the parties discuss attorneys' fees. (Agreement, 14:16-18; Carpenter Decl., ¶18.) Further, given that any fee award

must be approved by the Court, Defendant has agreed to pay reasonable attorneys' fees and costs as awarded by the Court, but the parties did not negotiate a specific fee payment. Rather, Plaintiff agreed not to seek more than $425,000.00 for fees and costs and Defendant has agreed not to object to this request. (Agreement, 14:11-113.). As discussed in Plaintiff's Motion for Attorney's Fees, the fee and cost award which is sought pursuant to Civil Code section 1780 and Code of Civil Procedure section 1021.5 is significantly less than counsel's lodestar amount of $536,355.00, not even including costs.

Similarly, the PAO also preliminarily designated Mr. Djoric as the Class Representative. (PAO, at 20:21.) In that capacity, as explained in Plaintiff's fee motion, Plaintiff seeks payment of an incentive award for his committed service and substantial time and effort serving as a class representative, in the amount of $10,000.00. Defendant has agreed not to oppose the request and, as with attorneys' fees, an award of such funds will have no impact on the payments made to the Class. (Agreement, 14:11-18.)

Notably, after this lawsuit was filed and beginning in May 2016, Defendant substantially revised all of its marketing related to country of origin, including eliminating its unqualified representations that its products were "handcrafted in the USA." Defendant has revised its website, removed unqualified American flags from its boots and box labels, changed hang-tags, and added disclaimers on its website explaining that its boots are "made with imported parts and materials." This lawsuit was the catalyst in bringing about these specific changes, which further supports both the requested attorneys' fee award and the requested class representative incentive.

IV. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL

A. The Standards for Approval of Class Action Settlements

As a matter of public policy, settlement is a strongly favored method of resolving disputes. (*See Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (1989).) There is also a "strong judicial policy that favors settlement," particularly "where complex class action litigation is concerned." (*Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 2176 (9th Cir. 1992); 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (4th ed. 2002) § 11:41 ("Newberg"); *In re Pacific Enterprises Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

The court has broad discretion in reviewing a proposed class settlement for approval. (*Wershba v. Apple*, 91 Cal.App.4th 224, 234-235 (2001); *Kullar v. Foot Locker Retail, Inc,*.168 Cal.App.4th 116, 127-128 (2008).) The Court must consider whether the settlement as a whole is reasonable; it stands or falls in its entirety. (*See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998); *Class Plaintiffs, supra*, 955 F.2d at 1276; *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982).)

"The settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits." (*Officers for Justice, supra*, 688 F.2d at 625.) Yet, the Court should explore "all the relevant factors" bearing on approval of a class action settlement. (*See Hanlon, supra*, 150 F.3d at 1026.) In determining the fairness of a proposed settlement, the court is guided by factors which were summarized by the Ninth Circuit in *Hanlon*, 150 F.3d at 1026:

> Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extend of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

(*Accord In re Mego Finan.al Corp. Secur. Lit. v. Nadar,* 213 F.3d 454, 458 (9th Cir. 2000); *Torrisi v. Lazar,* 8 F.3d 1370, 1375 (9th Cir. 1993).) "This list is not exhaustive and should be tailored to each case. Due regard should be given to what is otherwise a private consensual agreement between parties." (*Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).) "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." (*Officers for Justice, supra,* 688 F.2d at 625.) Due regard should be given to what is otherwise a private consensual agreement between the parties. (*Id*.) The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Id*.) "Ultimately, the [trial] court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'" (*Id*. (citation

omitted.).) All of these factors support final approval.

Moreover, there is a strong and uniform policy in the State of California favoring compromises leading to the expeditious resolution of litigation. (*Hamilton v. Oakland School Dist,*. 219 Cal. 322, 329 (1933) ("it is the policy of the law to discourage litigation and to favor compromises"); *Rich Vision Ctrs., Inc. v. Board of Medical Examiners*, 144 Cal.App.3d 110, 115 (1983) (there exists a "general policy of favoring compromises of contested rights"); *Stambaugh v. Superior Court*, 62 Cal.App.3d 231, 235 (1976).) This judicial policy is particularly compelling in cases such as this involving a complex representative action. (*Officers for Justice, supra*, 688 F.2d at 625 ("voluntary conciliation and settlement are the preferred means of dispute resolution . . . especially . . . in complex class action litigation.")

B. The Proposed Settlement Warrants a Presumption of Fairness

A class settlement should be approved if the settlement is found to be fair, adequate, and reasonable. (*Dunk*, 48 Cal.App.4th 1794, 1801.) Generally, a presumption of fairness exists where (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the Court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (*Id.* at 1802.) The proposed settlement here satisfies the above requirements.

There is an initial presumption that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. (*See Williams v. Vukovich*, 720 F.3d 909, 922-923 (6th Cir. 1983) ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs"); *see also* 4 *Newberg on Class Actions* §11.41; Manual for Complex Litigation (Third) §30.42.) Indeed, the non-collusive nature of the negotiations and the stature of counsel have often been recognized as important factors in the final approval of class action settlements. (*See Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D.Cal.1980) aff'd (9th Cir. 1981) 661 F.2d 939 ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight").)

1. The Settlement is the result of arm's-length negotiations

The first consideration in the approval analysis is whether the settlement is the result of

serious, informed and non-collusive negotiations. Courts place "a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution[.]" (*Rodriguez v. West Publishing Corp.,* 563 F.3d 948, 965 (9th Cir. 2009).) "Where a settlement is the product of arms-length negotiations conducted by capable and experienced counsel, the Court begins its analysis with a presumption that the settlement is fair and reasonable." (*Garner v. State Farm Mut. Auto. Ins. Co.*, No. 08-1365, 2010 WL 1687832, *13 (N.D. Cal., Apr. 22, 2010).) The proposed settlement here is the result of more than three years of investigation and hard-fought litigation which concluded with extensive negotiations that took place over the course of more than a year. (Carpenter Decl., ¶10.) Plaintiff's counsel were fully informed of the evidence supporting Plaintiff's allegations, the size of the putative class, and the scope of the injuries of its members when they negotiated the Settlement.

2. Substantial investigation and discovery have been conducted

Plaintiff began formal discovery in this matter shortly after the Complaint was at issue. Ultimately, Plaintiff served multiple sets of Requests for Admissions, Requests for Production, Form Interrogatories, and Special Interrogatories, took the deposition of Defendant's corporate designee, and utilized the Court's discovery dispute process. As a result of these efforts and the substantial meet and confer hours that they required, Plaintiff obtained information regarding Defendant's 394 boot models which were mislabeled within the Class period, the volume of the products introduced into the California market, and thus, the relative scope of the Class and the approximate amount of money at issue. (Carpenter Decl., ¶4.) Additionally, informal discovery and investigation obtained by Plaintiff's counsel informed them of why similar cases succeeded and why others did not. (Id.)

Indeed, because of the extensive discovery obtained, Plaintiff's counsel were fully informed of the strengths and weaknesses of Plaintiff's allegations and thus, could be confident that they were in the best possible position to evaluate the risks of continued litigation and negotiate a resolution on behalf of the Class. Consequently, Plaintiff's counsel are confident that the proposed Settlement, which guarantees significant injunctive relief as well as actual monetary compensation to each member of the Settlement Class, is a highly successful result.

3. Plaintiff counsel is experienced in class litigation

Also weighing in favor of preliminary approval are Plaintiff's Counsel's experience and success in other consumer class actions. (*Wershba,* 91 Cal.App.4th at 245.) Plaintiff's Counsel have worked on large, complex cases for decades, with a particular focus on consumer protection claims. Collectively, Plaintiff's Counsel have over 60 years of experience in consumer litigation. (Carpenter Decl., ¶¶13, 14, 17.) Drawing from these experiences, Plaintiff's counsel executed the Settlement Agreement confident that it constitutes a fair and adequate outcome. (Id., ¶14.)

4. The reaction of the settlement class

This motion is being filed on the last day for class members to object, opt-out or file claims. To date, no class member has objected. Indeed, there have been over 24,000 claims made (Keogh Decl., ¶22), resulting in a direct monetary benefit to the class, even if claims for only 13,057 pairs of boots are ultimately approved, in excess of $325,000. Further, Class counsel is not aware of any negative reaction from any class members. (Id.)

C. A Comparison Between the Relief Provided by the Settlement and the Potential Result of Proceeding Through Trial Underscores the Value of the Settlement

Plaintiff and Class Counsel closely considered the potential recovery which might be achieved for the Class if this matter proceeded through trial. (Carpenter Decl., ¶11.) That evaluation confirmed that the proposed Settlement is in the best interests of the Class.

Plaintiff's counsel estimates that if Plaintiff were to prevail on the merits, he could recover injunctive relief along the same lines as that agreed to by Defendant in the settlement, as well as some restitution or monetary damages. While damages have been approached in different ways in similar cases, some cases have measured damages as a percentage of the purchase price, based upon the corresponding percentage value of foreign made components, for example. Using a $250 purchase price for boots with a foreign-made upper consisting of approximately 50% of a boot's value, Plaintiff's counsel estimates that the high range of recoverable damages is $125 per purchase. Even under this high measure of damages, many Class members' damages would be substantially less, based on lower purchase prices and/or less substantial foreign made

components. Further, a different damages model could ultimately be applied, such as one based on Defendant's significantly lower wholesale prices. Based on this comparison, and given the costs and risks of further litigation (including the risks that the Class will not be certified and that damages will be difficult to prove), the settlement, providing for monetary relief of either $25 in cash or $50 in Promotional Codes per boot purchase, is an excellent result.

Nonetheless, despite the potential recovery and the confidence that Plaintiff has in the substantive underpinning of his case, continuing to litigate this dispute is not without risks. (Carpenter Decl., ¶¶11, 12.) For example, if litigation continued, this matter would still need to overcome the hurdle of obtaining class certification as well as any potential motion for summary judgment. These hurdles were alone significant enough to warrant a discount at settlement. If Defendant defeated certification there would be no class-wide relief regardless of the merits of the Class members' claims. Further, even if Plaintiff was successful on a motion for class certification, Defendant could move for decertification of the Class before or during trial and likely would challenge certification on appeal. Accordingly, this factor weighs heavily in favor of final approval of the Settlement Agreement, because if at any point the Class failed to become certified or if certification was reversed, the Class would get nothing.

Further, even if the Class was certified *via* motion and this matter continued through trial, there is no way to assure that the Class would fare any better than the proposed Settlement. Even a meritorious case can be lost at trial with devastating results. (*See In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486CW, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007) (after a lengthy trial, jury returned a verdict against plaintiffs, the action was dismissed and plaintiffs were ordered to pay defendants the costs of defending the action.).) Indeed, as one court has aptly noted, "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements". (*Officers for Justice v. Civil Service Com'n, of City and County of San Francisco*, 688, F.2d 615, 625 (9th Cir. 1982).) Nor does success at trial eliminate the risk to the Class. In *In re Apollo Group, Inc. Sec. Litig.*, following a plaintiffs' verdict, the court overturned the verdict and granted defendants' motion for judgment as a matter of law. (*In*

re Apollo Group, Inc. Sec. Litig., No. CV 04-2147-PHX-JAT, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008).)

Additionally, but for this litigation and the proposed settlement, the claims of the Class members would likely go un-prosecuted because their individual claims are not large enough to warrant individual litigation. Further, the claims are also the type which would likely not be vindicated on an individual basis because, by the very nature of the allegations, the existence of the claims alleged here were not likely to be discovered by the Class. Lastly, the Settlement provides for relief now rather than a speculative payment years from now. Consequently, Plaintiff is confident that the proposed settlement is a highly successful result for the Class.

V. CONCLUSION

Accordingly, Plaintiff respectfully requests that the Court grant final approval and enter the Final Approval Order as requested.

DATED: July 9, 2018

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is:

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On July 9, 2018, I served the foregoing documents, described:

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

via electronic transmission addressed as follows:

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[X] VIA ELECTRONIC TRANSMISSION TO CASE ANYWHERE AT WWW.CASEANYWHERE.COM

[ ] VIA ELECTRONIC MAIL

Executed on July 9, 2018, at Anaheim, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Carlo Aguilar