

1 **GUTRIDE SAFIER LLP**

2 ADAM J. GUTRIDE (State Bar No. 181446)

3 adam@gutridesafier.com

4 SETH A. SAFIER (State Bar No. 197427)

5 seth@gutridesafier.com

6 KRISTEN SIMPLICIO (State Bar No. 263291)

7 kristen@gutridesafier.com

8 100 Pine Street, Suite 1250

9 San Francisco, California 94111

10 Telephone: (415) 336-6545

11 Facsimile: (415) 449-6469

12 **TYCKO & ZAVAREEI LLP**

13 HASSAN A. ZAVAREEI (State Bar No. 181547)

14 hzavareei@tzlegal.com

15 1828 L Street, N.W., Suite 1000

16 Washington, DC 20036

17 Telephone: (202) 973-0900

18 Facsimile: (202) 973-0950

19 Attorneys for Plaintiff and the Class

20 SUPERIOR COURT OF THE STATE OF CALIFORNIA

21 COUNTY OF ALAMEDA

22 ROHINI KUMAR, an individual, on behalf of
23 herself, the general public and those similarly
24 situated

25 Plaintiff,

26 v.

27 SAFEWAY, INC.,

28 Defendant,

Case No. RG 14726707

CLASS ACTION

PLAINTIFF’S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
APPLICATION FOR ATTORNEYS’ FEES,
COSTS AND INCENTIVE AWARD

Date: March 16, 2018

Time: 10:00 a.m.

Department: 21

Reservation No.: R-1904127

Honorable Judge Winifred Y. Smith

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION 1

II. ARGUMENT..... 1

 A. Plaintiff’s Counsel Should Be Awarded \$1,307,188.80 in Attorneys’ Fees
 and \$119,311.20 In Costs..... 2

 1. Plaintiff’s Counsel’s Requested Fee Is Reasonable When Assessed
 Using The Lodestar-Multiplier Method..... 2

 a. Plaintiff’s Counsel’s Lodestar Is Reasonable. 3

 b. An Upward Multiplier Would Be Appropriate In This Case..... 7

 2. A “Cross-Check” of The Requested Fee Under the Percentage-of-
 Recovery Approach Confirms its Reasonableness. 8

 3. Plaintiff’s Counsel Should Be Awarded \$119,311.20 in Costs..... 10

 4. Awarding Less Than The Requested Fees and Costs Will Cause A
 Windfall To Defendant. 11

 B. The Incentive Award To The Representative Plaintiff Is Reasonable..... 11

III. CONCLUSION 12

TABLE OF AUTHORITIES

CASES

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Alyeska Pipeline Co. v. Wilderness Society (1995) 421 U.S. 240 13

Arenson v. Board of Trade of City of Chicago, (N.D. Ill 1974) 372 F. Supp. at 1358 10

Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1407 4

Brinker v. Normandin’s, (N.D. Cal. Feb. 23, 2071) No. 14CV03007EJDHRL, 2017 WL 713554..... 7

Chavez v. Netflix, Inc. (2008) 162 Cal. App. 4th 43 12

City of Oakland v. Oakland Raiders, (1988) 203 Cal. App. 3d at 78 9, 10

Clejan v. Reisman (1970) 5 Cal. App. 3d 224 3

Coalition for L. A. County Planning etc. Interest v. Board of Supervisors (1977) 76 Cal. App. 3d 241 9

Cobell v. Norton, (D.D.C 2002) 231 F. Supp. 2d 295, 301-02 7

Downey Cares v. Downey Community Development Com., (1987), 196 Cal. App. 3d 9

Fed-Mart Corp. v. Pell Enterprises (1980) 111 Cal. App. 3d 215 3

Flannery v. California Highway Patrol (1988) 61 Cal. App. 4th 629 9

Galvez v. Americlean Servs. Corp., (E.D. Va. June 29, 2012) No. 1:11CV1351 JCC/TCB, 2012 WL 2522814 7

Glendora Community Redevelopment Agency v. Demeter (1984) 155 Cal. App. 3d 465 10, 11

Graciano v. Robinson Ford Sales, Inc., (2006) 144 Cal. App. 4th 140 11

Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553 3

Gutierrez v. Wells Fargo Bank, N.A., (N.D. Cal. May 21, 2015) No. C 07-05923 WHA, 2015 WL 2438274, appeal dismissed (Oct. 30, 2015) 6

Horn v. Swoap (1974) 41 Cal. App. 3d 375 2

In re Activision Sec. Litig. (N.D. Cal 1989) 723 F. Supp. at 1378 12

In re Cellphone Fee Termination Cases (2010) 186 Cal. App. 4th 1380 as modified (July 27, 2010) 14

In re Mego Fin. Corp Sec. Litig. (9th Cir. 2000) 213 F.3d 454 15

In re Optical Disk Drive Prod. Antitrust Litig., (N.D. Cal. Dec. 19, 2016) No. 3:10-MD-2143 RS, 2016 WL 7364803 6

Ketchum v. Moses (2001) 24 Cal. 4th 1122 3, 8, 9

1	<i>Kumar v. Salov N. Am. Corp.</i> , (N.D. Cal. July 7, 2017) No. 14-CV-2411-YGR, 2017 WL 2902898	2, 3
2	<i>Lealao v. Beneficial Cal., Inc.</i> (2000) 82 Cal. App. 4th 19	1, 4, 9, 10
3	<i>Levy v. Toyota Motor Sales, U.S.A.</i> (1992) 4 Cal. App. 4th 807	1
4	<i>Mancini v. Dan P. Plute, Inc.</i> , (9th Cir. 2009) 358 F. App'x 886	7
5	<i>Maria P. v. Riles</i> (1987) 43 Cal. 3d 1281, 1294	9
6	<i>McLaughlin v. Wells Fargo Bank, N.A.</i> , (N.D. Cal. Mar. 15, 2017) No. C 15-02904 WHA, 2017 WL 994969	6
7		
8	<i>Meister v. Regents of Univ. of Calif.</i> (1998) 67 Cal. App. 4th 437	3
9	<i>Melnyk v. Robledo</i> (1976) 64 Cal. App. 3d 618	3
10	Newberg & Conte, Attorney Fee Awards (2d ed. 1993) § 14.6 at 550-51	12
11	<i>Paul, Johnson, Alston & Hunt v. Graulty</i> (9th Cir. 1989) 886 F.2d 268	12
12	<i>Press v. Lucky Stores, Inc.</i> (1983) 34 Cal. 3d 311	9
13	<i>Ramos v. Countrywide Home Loans, Inc.</i> (2000) 82 Cal. App. 4th 615	4, 9
14	<i>Serrano v. Priest</i> (“ <i>Serrano III</i> ”) (1977) 20 Cal. 3d 25	3, 4, 9, 13
15	<i>Six Mexican Workers v. Arizona Citrus Growers</i> (9th Cir. 1990) 904 F.2d 1301	12
16	<i>Soderstedt v. CBIZ Southern California, LLC</i> (2011) 197 Cal.App.4th 13	2
17	<i>Sternwest Corp. v. Ash</i> (1986) 183 Cal. App. 3d 74	9
18	<i>Texas v. U.S.</i> , (D.D.C. Mar. 30, 2011) No. CV 11-1303 (RMC), 2017 WL 1194159	7
19	<i>Theme Promotions, Inc. v. News America Marketing FSI, Inc.</i> , (N.D. Cal. 2010) 731 F. Supp. 2d 937	7
20	<i>Wershba v. Apple Computer, Inc.</i> (2001) 91 Cal. App. 4th 224	2, 9
21	<i>Williams v. MGM-Pathe Commc'ns Co.</i> , (9th Cir. 1997) 129 F.3d 1026	2
22		
23	STATUTES	
24	California Civil Code section 1021.5	2
25		
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TREATISES AND OTHER AUTHORITIES

C.E.B., Attorney Fee Awards 2d, Chap. 11; C.J.E.R., Judges’ Benchbook, Civil Proceedings: Trial § 16.762

Incentive Awards to Class Action Plaintiffs: An Empirical Study, (2006) 53 UCLA L. Rev. 130314

The Courts and the Plaintiff’s Bar: Awarding the Attorney’s Fee in Class-Action Litigation (1994) 23 J. Legal Study 18512

1
2 **I. INTRODUCTION**

3 This case has been pending for over three years, and Plaintiff’s counsel have not yet
4 received any compensation for their work or for the out of pocket expenses they have incurred.
5 They collectively expended over 2300 hours investigating, litigating, and negotiating to reach a
6 successful resolution. The purpose of this motion is to apply for an award of attorneys’ fees, costs,
7 and incentive awards as provided in the settlement agreement. The amount is to be paid by
8 Defendant Safeway, Inc., separately from, and in addition to, all payments to class members. The
9 payment will not reduce any class member’s recovery.

10 The settlement confers significant benefits on class members. All class members will receive
11 benefits in their choice of cash or cash-value vouchers to Safeway stores. In addition, all class
12 members and the general public will benefit from changed practices, including changed labeling
13 and bottles that better protect oil quality.

14 Plaintiff’s counsel seeks an order from the Court awarding \$1,426,500 combined in
15 attorneys’ fees and costs for Plaintiff’s counsel, and \$6490 as an incentive award for the named
16 Plaintiff. The requested fees amount to a fractional (a.k.a. “negative”) lodestar multiplier of 0.74.
17 The Parties negotiated these provisions of the Settlement Agreement only after negotiating and
18 reaching an agreement as to all the other material terms. The resulting settlement is the product of a
19 non-collusive, adversarial negotiation in light of the work devoted by Plaintiff’s counsel under
20 California law. Plaintiff’s counsel’s corresponding request for fees and costs is fair, just, and
21 reasonable under California law and should be granted.

22 **II. ARGUMENT**
23

24 This Court has discretion over the amount of attorneys’ fees awarded. *See Lealao v.*
25 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19, 25-26; *Levy v. Toyota Motor Sales, U.S.A.* (1992) 4
26 Cal. App. 4th 807, 813, *Horn v. Swoap* (1974) 41 Cal. App. 3d 375, 384 (use of mechanical formula
27 rejected); C.E.B., Attorney Fee Awards 2d, Chap. 11; C.J.E.R., Judges’ Benchbook, Civil
28

1 Proceedings: Trial § 16.76. Plaintiff’s counsel respectfully suggests that the requested fees, costs,
2 and incentive award are justified by the work performed and benefits obtained in this Litigation.

3 In assessing the reasonableness of a fee award, California courts are instructed to look at
4 what is made available to, and not what is finally claimed by, class members. *See, e.g., Wershba v.*
5 *Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 247 (rejecting argument that court should have
6 waited to see how many coupons were actually claimed and redeemed to value settlement); *see also*
7 *Kumar v. Salov N. Am. Corp.* (N.D. Cal. July 7, 2017) 2017 WL 2902898, at *4 (“The Court looks
8 to the entire value of the settlement, rather than just the amount of the claims made by class
9 members.”) (citing *Williams v. MGM-Pathe Commc ’ns Co.* (9th Cir. 1997) 129 F.3d 1026, 1027).¹

10 **A. Plaintiff’s Counsel Should Be Awarded \$1,307,188.80 in Attorneys’ Fees**
11 **and \$119,311.20 In Costs.**

12 **1. Plaintiff’s Counsel’s Requested Fee Is Reasonable When Assessed**
13 **Using The Lodestar-Multiplier Method.**

14 In California, attorneys’ fee awards are traditionally determined by taking the “lodestar”—or
15 the hours spent times the reasonable hourly compensation—and applying a “multiplier.” *See*
16 *Serrano v. Priest* (“*Serrano III*”) (1977) 20 Cal. 3d 25, 48-49; *see also Meister v. Regents of Univ.*
17 *of Calif.* (1998) 67 Cal. App. 4th 437, 449; *Melnyk v. Robledo* (1976) 64 Cal. App. 3d 618, 624-25;
18 *Clejan v. Reisman* (1970) 5 Cal. App. 3d 224, 241; *Fed-Mart Corp. v. Pell Enterprises* (1980) 111
19 Cal. App. 3d 215, 222. Where fees are available under statute, the “lodestar” method should be used
20 to determine a statutory attorneys’ fee award unless the statutory authorization for the award
21 provides for another method. In this case, fees are available by statute, and the statute does not
22 provide for a method of computing fees, so the lodestar method is appropriate.² *See Ketchum v.*

23 ¹ California courts look to rule 23 and federal cases interpreting rule 23 for guidance. *Soderstedt v.*
24 *CBIZ Southern California, LLC* (2011) 197 Cal.App.4th 133, 147, fn. 2. This guidance is
25 particularly useful following the implementation of the Class Action Fairness Act] and the , which
26 resulted in many federalization of many California consumer class actions being heard in federal
27 court.

28 ² On Plaintiff’s CLRA claims, Civil Code section 1780(d) provides, “The court shall award court
costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section.”
Moreover, because this litigation caused Defendant to change its practices, Plaintiff is entitled to
fees under C.C.P. 1021.5, as she was the catalyst for Defendant’s changed conduct. *See Graham v.*
DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 560–61 (affirming plaintiff’s right to recover
attorneys fees under California Civil Code section 1021.5, where the plaintiff was a “catalyst to

- 1 • Conducting extensive research and testing related to the quality of olive oil labeled “extra virgin”;
- 2 • Meeting and conferring with Defendant regarding discovery disputes and stipulations;
- 3 • Researching and drafting a motion for class certification and a reply thereto, and
- 4 preparing for and appearing at the hearing thereon;
- 5 • Researching and drafting an opposition to Defendant’s motion for issuance for letter
- 6 of request for foreign discovery;
- 7 • Defending the deposition of, and researching and drafting an opposition to
- 8 Defendant’s motion to strike the declaration of, Plaintiff’s expert witness, Dr.
- 9 Rodney Mailer;
- 10 • Deposing Defendant’s experts regarding olive oil quality and regarding the effect on
- 11 olive oil pricing of label representations;
- 12 • Meeting and conferring with Defendant regarding the form of class notice, following
- 13 the Court’s order certifying classes;
- 14 • Researching and drafting a motion for the approval of class notice and plan of notice,
- 15 and a reply thereto;
- 16 • Researching and drafting a motion for the issuance of letters of request to take
- 17 discovery from Defendant’s foreign olive oil suppliers;
- 18 • Researching and drafting a motion for summary adjudication;
- 19 • Drafting mediation statements and participating in five mediation sessions before
- 20 Judge Evelio Grillo of the Alameda Superior Court and Judge Williams Cahill
- 21 (retired) of JAMS ADR, Inc.;
- 22 • Negotiating and preparing the Settlement Agreement along with all corresponding
- 23 documents, including claim forms, summary notice and long form notice, and
- 24 proposed orders;
- 25 • Researching and preparing motion for preliminary approval and supporting
- 26 documents, including proposed preliminary approval order, proposed, and final
- 27 judgment;
- 28 • Supervising the work of the Claims Administrator;
- Researching and preparing motion for final approval and supporting documents;
- Preparing this Application and supporting documentation; and
- Preparing for and attending numerous hearings and case management conferences.

(Final Gutride Decl., ¶¶ 5-28; Final Zavareei Decl., ¶¶ 5-19.)

Before the final approval hearing, Plaintiff’s counsel’s efforts will also include, without limitation:

- Continued correspondence with Settlement Class Members and supervision of the work of the Claims Administrator;

- Filing replies in support of this Application and the motion for final approval, including opposing objections, if any.

(Final Gutride Decl., ¶¶ 28-29, 45; Final Zavareei Decl., ¶ 38.)

Plaintiff’s Counsel calculated their lodestar using Plaintiff’s Counsel’s regular billing rates, which for the attorneys involved range from \$343 to \$950 per hour. (Final Gutride Decl., ¶¶ 38-39; Final Zavareei Decl., ¶¶ 26-27.) In a recent decision involving similar litigation regarding olive oil labeling, the Northern District of California found that the two law firms that represent Plaintiff here—Tycko & Zavareei LLP and Gutride Safier LLP—charge hourly rates that “are reasonable and commensurate with those charged by attorneys with similar experience in the market.” *Kumar*, 2017 WL 2902898, at *7.³

For attorneys and staff at the Gutride Safier firm, these hourly rates are equal to market rates in San Francisco for attorneys of Plaintiff’s Counsel’s background and experience. (Final Gutride Decl., ¶ 42-44); *see also In re Optical Disk Drive Prod. Antitrust Litig.*, No. 3:10-MD-2143 RS, 2016 WL 7364803, at *8 (N.D. Cal. Dec. 19, 2016) (approving hourly rates of \$205 to \$950); *McLaughlin v. Wells Fargo Bank, N.A.*, No. C 15-02904 WHA, 2017 WL 994969, at *2 (N.D. Cal. Mar. 15, 2017) (approving an \$850 hourly rate for partners); *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2015 WL 2438274, at *5 (N.D. Cal. May 21, 2015), *appeal dismissed* (Oct. 30, 2015) (approving hourly rates of \$475 to \$975). Plaintiff’s Counsel Adam Gutride and Seth Safier are, respectively, graduates from Yale Law School 1994 and Harvard Law School 1998, with 23 and 19 years of litigation experience. (*Id.* ¶ 43.) Kristen Simplicio is 2007 graduate of American University, Washington College of Law (10 years of experience). (*Id.*)⁴

³ In that case, the plaintiff only moved to certify and settle claims that the olive oil was falsely labeled as “Imported from Italy.” The district court awarded \$985,000 in fees. This case involved significantly more work, as it had the additional claim that Safeway did not take adequate steps to ensure the olive oil it was selling would truly be extra virgin at the point of sale and through the best buy date. This portion of the litigation required the retention of an expert witness, coordination with an overseas laboratory, additional discovery and fact research, and a more complicated class certification brief. (Final Gutride Decl. ¶¶ 10, 14, 15, 18.)

⁴ Adam Gutride and Seth Safier were previously attorneys at the San Francisco office of the law firm of Orrick Herrington & Sutcliffe, where litigators who graduated in 1994 and 1998 respectively currently bill at hourly rates of in excess of \$1000. (Final Gutride Decl., ¶¶ 44.) The Gutride Safier firm’s billing rates have repeatedly been approved by other California Superior Court Judges, as well as other judges throughout California. (*Id.*, ¶ 42.)

1 For attorneys and staff from the Washington, D.C. office of Tycko & Zavareei LLP, the
2 hourly rates are calculated using the Laffey Matrix.⁵ “The *Laffey* Matrix is the most commonly
3 used fee matrix in determining fees for complex federal litigation in the D.C. Circuit.” *E.g., Texas v.*
4 *U.S.*, No. CV 11-1303 (RMC), 2017 WL 1194159, at *4 (D.D.C. Mar. 30, 2017); *see also Galvez v.*
5 *Americlean Servs. Corp.*, No. 1:11CV1351 JCC/TCB, 2012 WL 2522814, at *5 n.6 (E.D. Va. June
6 29, 2012) (“The Laffey Matrix is used as a guideline for reasonable attorneys’ fees in the
7 Washington/ Baltimore area.”); *Cobell v. Norton*, 231 F. Supp. 2d 295, 301-02 (D.D.C. 2002)
8 (referring to Laffey Matrix as containing “standard hourly rate for attorneys in the Baltimore–
9 Washington area”). The Ninth Circuit has accepted the Laffey Matrix as evidence of reasonable
10 hourly rates charged by Washington, D.C. attorneys. *Mancini v. Dan P. Plute, Inc.*, 358 F. App’x
11 886 (9th Cir. 2009). The U.S. District Court for the Northern District of California recently awarded
12 Bay Area attorneys Laffey Matrix fees adjusted *upwardly* by nine percent, so, if anything, the
13 Laffey Matrix comes in *below* the market rate for attorneys in this region. *See Brinker v.*
14 *Normandin’s*, No. 14CV03007EJDHRL, 2017 WL 713554 (N.D. Cal. Feb. 23, 2017) (citing *Theme*
15 *Promotions, Inc. v. News America Marketing FSI, Inc.*, 731 F. Supp. 2d 937, (N.D. Cal. 2010)).
16 Hassan Zavareei graduated from University of California, Berkeley School of Law and has 22 years
17 of litigation experience. (Final Zavareei Decl., ¶ 28.) Jeffrey Kaliel is a 2005 graduate of Yale Law
18 School (12 years of experience); Anna Haac is a 2006 graduate of University of Michigan Law
19 School (11 years of experience); and Andrew Silver is a 2012 graduate of Boston College Law
20 School (five years of experience). (*Id.*)⁶

21 These rates are the current rates charged by Plaintiff’s counsel, which are appropriate given
22 the deferred and contingent nature of counsel’s compensation.⁷ *Cf. Ketchum*, 24 Cal. 4th at 1132-33

23 ⁵ See <http://www.laffeymatrix.com/>.

24 ⁶ Hassan Zavareei was previously an attorney at the Washington, D.C. office of the law firm of
25 Gibson Dunn & Crutcher, where litigators who graduated in 1995 bill at hourly rates in excess of
26 \$1000. (Final Zavareei Decl., ¶ 36.) The Tycko & Zavareei firm’s rates have been approved by
courts throughout the country. (*Id.* ¶ 27.)

27 ⁷ Gutride Safier has made the computation using its 2017 rates, even though the rates have increased
28 in 2018. The current Laffey Matrix, which was used by Tycko & Zavareei, provides rates for 2017-
18.

1 (“A contingent fee must be higher than a fee for the same legal services paid as they are performed.
2 The contingent fee compensates the lawyer not only for the legal services he renders but for the loan
3 of those services.”).

4 **b. An Upward Multiplier Would Be Appropriate In This**
5 **Case.**

6 A law firm that focuses on contingent-fee class action cases does not get paid in every case.
7 Sometimes—as in several other cases these firms have handled—it gets nothing or is awarded fees
8 equal to only a small percentage of the amount it had worked. Where a plaintiff’s firm does
9 succeed, therefore, it is appropriate to award a multiplier, to compensate for the risks the firm
10 regularly undertakes. Because Plaintiff’s counsel’s lodestar attributable to this litigation of
11 \$1,766,193.30 is more than the requested fee award of \$1,307,188.80, no multiplier is necessary.
12 But if this Court reduces the lodestar below the requested fee of \$1,307,188.80, it should still award
13 the requested fee of \$1,307,188.80, by applying a very modest upward multiplier.

14 This Court has discretion to apply a multiplier to account for various factors, including, *inter*
15 *alia*, the contingent nature of the fee award (both from the point of view of eventual victory on the
16 merits and the point of view of establishing eligibility for an award), the novelty and complexity of
17 the questions involved, the value of class benefits obtained, and the importance of other injunctive
18 relief obtained. *See Ramos*, 82 Cal. App. 4th at 622. There is no exclusive list of factors, nor any
19 “mechanical formula that dictates how the trial court should evaluate” them. *Lealao*, 82 Cal. App.
20 4th at 41 (quoting *Flannery v. California Highway Patrol* (1988) 61 Cal. App. 4th 629, 639). *See*
21 *also Serrano III*, 20 Cal. 3d at 49; *Ketchum*, 24 Cal. 4th 1122 at 1138; *City of Oakland v. Oakland*
22 *Raiders*, (1988) 203 Cal. App. 3d at 78; *Downey Cares v. Downey Community Development Com.*,
23 (1987), 196 Cal. App. 3d at 995 n.11; *Maria P. v. Riles* (1987) 43 Cal. 3d 1281, 1294 n.8; *Press v.*
24 *Lucky Stores, Inc.* (1983) 34 Cal. 3d 311, 322; *Serrano v. Unruh (“Serrano IV”)* (1982) 32 Cal. 3d
25 621, 625 n.6.

26 A multiplier to offset any reduction in Plaintiff’s counsel’s lodestar would fall well within
27 (indeed below) the range commonly applied by California courts. For example, in *Sternwest Corp.*
28 *v. Ash* (1986) 183 Cal. App. 3d 74, the Court of Appeal remanded a case for a lodestar enhancement

1 of “two, three, four or otherwise.” *Id.* at 76. Another California court explicitly stated that
2 “[m]ultipliers can range from two to four or even higher.” *Wershba*, 91 Cal. App. 4th at 240 (citing
3 *Coalition for L. A. County Planning etc. Interest v. Board of Supervisors* (1977) 76 Cal. App. 3d
4 241, 251 (affirming a multiplier of 2) and *Arenson v. Board of Trade of City of Chicago*, (N.D. Ill
5 1974) 372 F. Supp. at 1358 (awarding a fee four times the normal hourly rate on ground that, if the
6 case had not settled and gone to verdict, “there is no doubt that the number of hours of lawyer’s
7 time expended would be more than quadruple the number of hours expended to date”)); *see also*
8 *City of Oakland*, 203 Cal. App. 3d at 83 (affirming a 2.34 multiplier); *Glendora Community*
9 *Redevelopment Agency v. Demeter* (1984) 155 Cal. App. 3d 465, 479-80 (approving a fee award
10 representing a multiplier of 12).⁸

11 **2. A “Cross-Check” of The Requested Fee Under the Percentage-of-**
12 **Recovery Approach Confirms its Reasonableness.**

13 In evaluating this Application, the Court may explicitly consider the requested fees as a
14 percentage of the total settlement value. In other words, the Court may “cross-check” the
15 reasonableness of the lodestar-based fee under the percentage-of-recovery (or percentage-of-
16 benefit) approach. This cross-check is a common practice in both California and federal courts of
17 adjusting the lodestar based on the “amount at stake” and the “results obtained.” *See Lealao*, 82 Cal.
18 App. 4th at 39-40 (“in cases in which the value of the class recovery can be monetized with a
19 reasonable degree of certainty and it is not otherwise inappropriate, a trial court has discretion to
20 adjust the basic lodestar through the application of a positive or negative multiplier where necessary
21 to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace
22 in comparable litigation”); *see also id.* at 49 (cross-check “provides a credible measure of the

23 ⁸ Additionally, this Application is being submitted (and posted to the Settlement Website) before the
24 period has ended for Settlement Class Members to opt out or object. Even after final approval,
25 Plaintiff’s counsel likely will have to answer questions from Settlement Class Members and consult
26 with Defendant and the Claims Administrator concerning the fulfillment of the Class Benefits.
27 Though unlikely, Plaintiff’s counsel may also have to spend significant time opposing appeals. This
28 time might not be compensated, but it will be required of Plaintiff’s counsel to make certain the
Settlement Class Members receive their benefits as soon as practicable. Should the Court award less
than the maximum amount of fees agreed to be paid by Defendant, Plaintiff’s counsel reserves the
right to seek additional attorneys’ fees for later-performed work.

1 market value of the legal services provided”); *Glendora*, 155 Cal. App. 3d at 474.

2 Here, the settlement permits each class member to obtain a same-as-cash Voucher to use at
3 Safeway, or a cash payment. The class member need not have saved proofs of purchase, but need
4 only supply a Safeway Club Card number or associated telephone number, to claim *all* purchases
5 made (with no cap). Benefits also are available for up to five purchases without any club card
6 number, telephone number, or other proof of purchase. The Voucher value is \$1.50 per bottle
7 purchased for the first 62 months (or 80%) of the Class Period, and \$0.50 per bottle for the last 16.5
8 months (or 20%) of the Class Period. (Alternatively, the class member may elect to receive cash of
9 \$0.75 or \$0.25 per bottle for purchases in the same periods.) There were approximately 17.8 million
10 bottles sold during the class period. (Prelim Gutride Decl. ¶ 10.) Thus, the value of the Vouchers
11 made available is nearly \$22.9 million, and the alternative amount of cash made available is more
12 than \$11.4 million.

13 In addition, as a result of this litigation, Safeway is making changes to its representations
14 and bottling that will decrease future harm, saving class members and the general public from
15 additional losses. (Prelim. Gutride Decl. ¶¶ 12, Ex. 1, § III.) Mr. Weir has estimated that the value
16 of the removal of the phrase “Imported from Italy” to be worth \$5,279,450 to class members, as the
17 change is likely to lead to a lower average selling price for the products. (Weir Decl. at ¶ 90.) There
18 is also value in the improved packaging that will better protect the quality of the oil. While a precise
19 dollar amount cannot be put on this packaging change, Plaintiff’s counsel should still be credited for
20 having achieved an improvement that will benefit class members. Cf. *Graciano v. Robinson Ford*
21 *Sales, Inc.*, 144 Cal. App. 4th 140, 164 (2006) (“Finally, because this matter involves an individual
22 plaintiff suing under consumer protection statutes involving mandatory fee-shifting provisions, the
23 legislative policies are in favor of Graciano's recovery of all attorney fees reasonably expended,
24 without limiting the fees to a proportion of her actual recovery.”). Thus, Plaintiff is making, at a
25 minimum, more than \$16.7 million available to the class.

26 Courts applying the percentage-of-the-benefit approach have typically awarded fees in a
27 range from 20 to 30 percent and sometimes higher. *See. e.g., Chavez v. Netflix, Inc.*, 162 Cal. App.

1 4th 43, 66, n.11 (2008) (finding a fee award of 27.9 percent of the benefits to the class to be
2 consistent with class action fee awards issued under a percentage of the benefit method); *Six*
3 *Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1311; *accord Paul,*
4 *Johnson, Alston & Hunt v. Grauly* (9th Cir. 1989) 886 F.2d 268, 273 (“25 percent has been a
5 proper benchmark figure . . . and any modification should be accompanied by a reasonable
6 explanation of why the benchmark is unreasonable under the circumstances”). Studies also show
7 that this benchmark is within the range followed by most courts. *See, e.g.,* Lynk, *The Courts and the*
8 *Plaintiff’s Bar: Awarding the Attorney’s Fee in Class-Action Litigation* (1994) 23 J. Legal Study
9 185, 208; Newberg & Conte, *Attorney Fee Awards* (2d ed. 1993) § 14.6 at 550-51 (“In the normal
10 range...fee awards fall in the 20 to 33 percent range...usually 50 percent...is the upper limit”);
11 *Paul, Johnson*, 886 F.2d at 273 (“ordinarily...fee awards range from 20 percent to 30 percent of the
12 fund created”); *In re Activision Sec. Litig.*, (N.D. Cal 1989) 723 F. Supp. at 1378 (setting 30 percent
13 as fee for all future class action common-fund cases in that court). In the free market, one regularly
14 sees negotiated contingent fee arrangements in which the lawyers retain 25%, 33%, 40% or even
15 more of the plaintiff’s recovery.

16 Based on the conservative estimate of a \$16.7 million benefit, a 25% fee would suggest fees
17 of \$4.18 million, substantially more than the approximately \$1.3 million being requested here.

18 Thus, a “cross-check” reveals that the fee requested by Class Counsel is reasonable.

19 **3. Plaintiff’s Counsel Should Be Awarded \$119,311.20 in Costs.**

20 Plaintiff’s counsel requests that, in addition to reasonable attorneys’ fees, the Court grant its
21 application for reimbursement of approximately \$119,311.20 in expenses incurred by it in
22 connection with the prosecution of this Litigation.⁹ Safeway agreed in the Settlement Agreement to
23 reimburse these expenses. Plaintiff believes that the expenses are reasonable and should be
24 reimbursed. (Final Gutride Decl. ¶ 46; Final Zavareei Decl., ¶ 37.)

25 _____
26 ⁹ As discussed in the Final Gutride Declaration, the expenses are current as of January 31, 2017.
27 They do not include expenses that have yet to be invoiced, including (for example) service and
28 filing fees and expenses associated with this Application and the Final Approval Motion Plaintiff’s
counsel anticipates that these costs will be approximately \$400.

1 Plaintiff's counsel is typically entitled to reimbursement of all reasonable out-of-pocket
2 expenses and costs in prosecution of the claims and in obtaining a settlement. *See Serrano III*, 20
3 Cal. 3d at 35. In *Serrano III*, the Supreme Court advised that reimbursement of costs in a common
4 fund is "grounded in 'the historic power of equity to permit the trustee of a fund or property, or a
5 party preserving or recovering a fund for the benefit of others in addition to himself, to recover his
6 costs, including his attorneys' fees, from the fund or property.'" *Id.* (citing *Alyeska Pipeline Co. v.*
7 *Wilderness Society* (1995) 421 U.S. 240, 257).

8 **4. Awarding Less Than The Requested Fees and Costs Will Cause A**
9 **Windfall To Defendant.**

10 Defendant has already agreed it should pay the full amount of the requested fees and costs,
11 separate from and in addition to the amounts paid for notice and claims administration and the
12 amounts paid to Class Members. If the request is cut, no additional money will be paid to Class
13 Members. Rather, the money will remain with, and be a windfall to, Safeway. As the negotiations of
14 the Settlement were hard-fought, Safeway already believes that it is better off paying the full
15 amounts owing under the Settlement than proceeding to trial. That conclusion is not surprising, as
16 Defendant has been charged with substantial wrongdoing. It is not in the interests of justice to allow
17 Safeway to retain the funds that it believes should be paid to Plaintiff's counsel for Plaintiff's
18 counsel's work on the case.

19 **B. The Incentive Award To The Representative Plaintiff Is Reasonable.**

20 This Court should also approve a \$6,490.00 incentive award to the named Plaintiff, as it is
21 just, fair and reasonable. In deciding whether to approve an incentive award, a court should
22 consider: "(1) the risk to the class representative in commencing suit, both financial and otherwise;
23 (2) the notoriety and personal difficulty encountered by the class representative; (3) the amount of
24 time and effort spent by the class representative; (4) the duration of the litigation and; (5) the
25 personal benefit (of lack thereof) enjoyed by the class representative as a result of the litigation." *In*
26 *re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1394 (2010), *as modified* (July 27,
27 2010) (internal citations and quotations omitted). Further, as a matter of public policy, incentive
28 awards are necessary to encourage consumers to formally challenge perceived false advertising and

1 unfair business practices.

2 Plaintiff took on substantial risk, most importantly the risk of bearing Defendant’s costs.
3 (Final Gutride Decl., ¶ 32.) Plaintiff also spent many hours during the nearly four years of this
4 Litigation participating in the case, including reviewing documents, sitting for a deposition,
5 attending a settlement conference, responding to extensive discovery requests, including 78
6 document requests, and remaining actively involved in the case during and after settlement. (Id., ¶¶
7 13, 32.) Had she not come forward, there is no reason to believe that Defendant would ever have
8 agreed to pay. She is also agreeing to a release of all claims against Safeway—not just claims at
9 issue in this lawsuit—unlike the more limited release applicable to class members. (Id., ¶¶ 32.)


10 In light of Plaintiff’s efforts, Safeway has agreed to pay her a \$6,490 incentive award.
11 Plaintiff’s counsel respectfully requests that the Court approve the incentive award, which is
12 reasonable in light of the Plaintiff’s efforts and the relief to the Settlement Class resulting from this
13 Litigation and her broader release. *See id.* (reviewing cases; upholding incentive award of \$10,000);
14 Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An*
15 *Empirical Study*, 53 UCLA L. Rev. 1303, 1333 (2006) (an empirical study of incentive awards to
16 class action plaintiffs has determined that the average aggregate incentive award within a consumer
17 class action case is \$29,055.20, and that the average individual award is \$6,358.80.); *see also In re*
18 *Mego Fin. Corp Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 463 (awarding the named plaintiff \$5,000
19 involving a class of 5,400 people and a total recovery of \$1.725 million).

20 **III. CONCLUSION**

21 For the foregoing reasons, Plaintiff asks this Court to grant this application for an award of
22 \$6,490.00 to her, and \$1,426,500.00 in attorneys’ fees and expenses incurred in this Litigation to be
23 paid by Safeway separately from the benefits provided to the Settlement Class, in accordance with
24 the Settlement Agreement.

25 DATED: February 2, 2018

GUTRIDE SAFIER LLP

26
27 By: 
Adam Gutride, Attorney for Plaintiff