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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TODD HALL and GEORGE ABDELSAYED individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MARRIOTT INTERNATIONAL, INC., a Delaware corporation,

Defendant.

Case No. 3:19-cv-01715-JO-AHG

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: May 15, 2024
Time: 8:30 a.m.
Ctrm: 4C
Judge: Hon. Jinsook Ohta

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Todd Hall and George Abdelsayed ("Plaintiffs"), on behalf of themselves and the Class[1] they represent, respectfully move for preliminary approval of the proposed class action settlement ("Settlement" or "Settlement Agreement") with Marriott International, Inc. ("Defendant" or "Marriott"). *See* ECF Nos. 273 and 275 and Ex. 1 to Declaration of Robert Teel In Support of Motion for Preliminary Approval ("Teel Decl."). Plaintiffs have diligently and zealously litigated this case over the past five years. Following extensive discovery and motion practice and multiple rounds of settlement negotiations, on the literal eve of trial Plaintiffs and Marriott reached the Settlement whereby Marriott has agreed to implement substantial changes to its business practices that ensure the rights of the Class Members and California consumers are protected.

Marriott has changed its business practices to eliminate the use of the "blue box" disclosure in the booking flow to disclose Resort Fees and now discloses the Total Room Price as opposed to just the starting room rate. The proposed Settlement also requires Marriott to: (1) change the calendar view on its Marriott US Websites so the cost identified for each calendar day is the lowest Total Room Price and not just the lowest available room rate; (2) promptly modify and fix all known instances in which an amenity advertised as complimentary or free is included as a Resort Fee amenity; (3) notify its Marriott Hotels that charge a Resort Fee that under Marriott's resort fee policy no amenity offered as complimentary or free may be included as a Resort Fee amenity; (4) request its Marriott Hotels that charge a Resort Fee take commercially reasonable actions to ensure that they are not presently offering any complimentary or free amenity as a Resort Fee amenity; and (5) to ensure compliance with the Settlement's requirements, serve on Class Counsel a declaration twelve (12) months

[1] Capitalized terms shall have the same meaning as set forth in the Settlement Agreement attached as Exhibit 1, hereto, unless otherwise noted.

after the Effective Date describing and informing Class Counsel of its compliance in connection with the terms of the Settlement.

Securing the change in Marriott's business practices enforces and protects the rights and interests of Class Members, consumers, and the public and eliminates virtually any risk Class Members will be deceived about the Total Room Price of a stay at a Marriott Hotel. Plaintiffs' determination that it is in the best interests of the Class to secure the changes in Marriott's business practices is based in part on recognition that the Court's certification of the Class was for liability issues only.

As a result, assuming *arguendo* Plaintiffs prevailed on the liability issues, hundreds of thousands of Class Members would still have to try their individualized damages claims either through protracted bifurcated proceedings in this Action, or by filing their own individual lawsuits.[2] As the Court recognized, the small dollar amount of damages for each Class member provides little motivation for Class Members to pursue individual damages cases (ECF No. 180, 42:9-15) and additional protracted litigation in connection with Marriott's individualized defenses to damages claims would not serve the Class Members' interests or the interest of judicial economy.

In addition, separate trials of Plaintiffs' and the Class Members' individualized damages claims creates a meaningful risk that Plaintiffs and the Class would be unable to recover any compensatory or punitive damages without years of additional litigation, including at the appellate level. If Marriott were successful in a motion for decertification based on the manageability of the required individualized damages determinations, the prospect for any resolution of this Action would be in jeopardy.

The Settlement is the product of extensive adversarial arms-length negotiations that took place over six months with the assistance of an experienced mediator and Magistrate Judge Allison H. Goddard. The Settlement was negotiated by lawyers with

[2] Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 706–09 (2006) (Discussing the key differences between a bifurcated class action and a "partial class action" or hybrid class action in greater depth).

significant experience in consumer protection and class action litigation and was reached only after the Parties were well-informed of all the relevant facts and the strengths and weaknesses of Plaintiffs' case and of Marriott's defenses.

As a result of the extensive discovery and law and motion proceedings leading up to the eve of trial, Plaintiffs' counsel can be reasonably certain that the Settlement represents the best possible result for the Class under the circumstances of this case. Based on, *inter alia*, the foregoing, the Settlement is fair, adequate, and reasonable and satisfies all the criteria for preliminary approval.

II. OVERVIEW OF THE LITIGATION

A. Substantial Early Motion Practice Challenged The Pleadings

On September 9, 2019, Plaintiff Todd Hall initiated a putative class action against Marriott alleging it intentionally deceived consumers about the characteristics and Total Cost of a stay at its Marriott Hotels. ECF No. 1. The initial complaint asserted claims for violations of Cal. Civ. Code §§ 1750, *et seq*. ("CLRA"), violations of Cal. Bus. & Prof. Code §§ 17500, *et seq*. ("FAL"), violations of the Cal. Bus. & Prof. Code §§ 17200, *et seq*. ("UCL"), and unjust enrichment. *Id.*

In response to Defendant's motion to dismiss (ECF No. 11), Plaintiffs filed a first amended complaint adding claims for negligent misrepresentation, concealment, and intentional misrepresentation. ECF No. 15. Marriott again moved to dismiss. ECF No. 18. After full briefing, the Court denied Marriott's motion. ECF No. 31. Plaintiffs filed a second amended complaint adding plaintiffs Julie Drassinower, Kevin Branca, and Jesse Heineken. ECF No. 54. On March 23, 2021, Plaintiffs moved to consolidate with related Case No. 3:21-cv-00402-BEN-JLB. ECF No. 72. On April 27, 2021 the Court granted the motion to consolidate. ECF No. 78.

On May 27, 2021, Plaintiffs filed the operative consolidated third amended Complaint, which added Plaintiff George Abdelsayed, alleging claims under the CLRA, FAL, UCL, unjust enrichment, negligent misrepresentation, concealment, and

intentional misrepresentation. ECF No. 82. Marriott answered the third amended Complaint, and with the pleadings settled discovery continued in earnest.

B. Discovery

At the time the pleadings were settled extensive discovery had already been underway, including the exchange of multiple sets of written interrogatories and requests for admission, the production of thousands upon thousands of pages of documents, and the issuance of a number of subpoenas. Protracted discovery disputes ensued with the Parties filing numerous additional discovery motions, including without limitation Plaintiffs' motion to compel discovery responses, the Parties joint motion for determination of discovery disputes, Marriott's objection under Fed. R. Civ. Proc. ("FRCP") 72(a) to the Court's order on the Parties joint motion to determine discovery disputes, and the Parties' joint motion for determination of discovery dispute relating to the second deposition of since dismissed plaintiff Kevin Branca.

C. Plaintiffs' Summary Judgment And Class Certification Motions

Defendant moved for summary judgment on April 8, 2022. ECF No. 140. Plaintiffs moved for partial summary judgment (ECF No. 143) and class certification (ECF No. 144) on April 15, 2022. Plaintiffs' summary judgment motion asked the Court to hold Marriott's business practices violated the CLRA, FAL, and UCL and that several of Marriott's affirmative defenses failed as a matter of law or for lack of evidence. ECF No. 143. The certification motion sought to certify FRCP 23(b)(2) and 23(b)(3) classes as well as an issues class under Rule 23(c)(4). ECF No. 144.

Plaintiffs argued that the commonality and typicality requirements were met by, without limitation, a common contention capable of class-wide resolution, namely whether Marriott's business practices are likely to deceive a reasonable consumer. ECF No. 144. Plaintiffs supported their adequacy argument with declarations from Plaintiffs and counsel attesting to, without limitation, Plaintiffs' commitment to the Class and counsels' experience in prosecuting complex litigation cases and consumer class actions. ECF Nos. 144-6, 144-7, 144-8, and 144-9.

On March 30, 2023, the Court resolved both motions granting in part and denying in part the Parties' motions for summary judgment. ECF Nos. 180 and 188. The Court granted in part Plaintiffs' motion for class certification by certifying an issues-only Class as to liability under Rule 23(c)(4) for Plaintiffs' CLRA and concealment claims. ECF No. 180, 42:15-17 and ECF 188, 6:12-14. The Court denied class certification for Plaintiffs' damages claims. ECF No. 180, 42:9-13. The Court appointed Plaintiffs as Class Representatives and Bursor & Fisher, P.A., the Law Offices of Ronald A. Marron, APLC, and the Law Office of Robert L. Teel as Class Counsel. ECF No. 180, 43:3-4.

The Court further held Plaintiffs are not entitled to restitution and injunctive relief under their CLRA, FAL, UCL, or unjust enrichment claims because (1) Plaintiffs lack standing to seek injunctive relief, and (2) the Court lacks jurisdiction over Plaintiffs' equitable claims. ECF No. 180, 9:7-11. As a result of the foregoing, only the named Plaintiffs individual claims seeking damages under the CLRA and for concealment were allowed to proceed.

D. Settlement Negotiations

Settlement negotiations initially commenced on September 18, 2023 when Class Counsel wrote counsel for Defendant suggesting a private settlement conference. After a status hearing with the Court on October 4, 2023, in parallel with the continuing active pursuit of the Litigation, the Parties agreed to conduct a full day of mediation before the Hon. Peter D. Lichtman (Ret.) in Los Angeles, California.

On November 14, 2023, the Parties participated in a nearly all-day mediation with Judge Lichtman in Los Angeles, California to attempt to resolve the Litigation. Judge Lichtman is very experienced in class action matters and previously served as head of the Los Angeles County Superior Court's Resort Settlement Program. He was also one of the founders of the Superior Court's Complex Civil Litigation program, and twice served as its supervising judge.

The morning after the mediation on November 15, 2023, Judge Lichtman issued a "mediator's proposal" indicating that if the Parties accepted, they should inform the Court that after having a robust and arms-length negotiation it was recommended as part of his proposal to vacate the certified issues-only class. The essential terms and conditions for a global resolution of the Litigation in accordance with the mediator's proposal were accepted by all Parties on November 17, 2023.

Thereafter, the Parties filed a joint motion (ECF No. 207) and supplemental briefing (ECF Nos. 214, 217, and 218) seeking Court approval of the mediated settlement proposal. On February 21, 2024, the Court denied the motion to approve the settlement and vacate the issues-only Class certification order. ECF No. 220. The Parties held two more settlement conference with Magistrate Judge Goddard on February 26, 2024 (ECF No. 227) and March 1, 2024 (ECF No. 229), but the case did not settle, and the Parties prepared for a jury trial scheduled for April 22, 2024.

On the morning of April 19, 2024 counsel for the Parties resumed their settlement discussions and later that evening essential binding Settlement terms were reached and agreed to by all Parties and their counsel. ECF Nos. 273 and 275. The terms of the Settlement have been further memorialized in a written Settlement Agreement dated May 9, 2020. At all times the settlement negotiations referred to herein were adversarial, non-collusive, and conducted at arms-length.

III. THE TERMS OF THE SETTLEMENT

A. Class Definition

The Class certified by the Court on March 30, 2023 consists of:

> All persons in California—except for persons who enrolled in Marriott's "Bonvoy" rewards program on or after April 24, 2015—who reserved or booked a Marriott managed or Franchised hotel room online through the Marriott.com website or Marriott mobile app and who paid a resort fee, destination fee, amenity fee, or destination amenity fee on or after September 9, 2015 and until the Class is certified excluding Defendant and Defendant's officers, directors, employees, agents and affiliates, the Court and its staff, and attorneys appearing in this action.

B. Relief for the Benefit of Plaintiffs and the Class

The proposed Settlement provides for changes to Marriott's business practices that virtually eliminates the risk that Class Members will be deceived about the Total Room Price of a stay at a Marriott Hotel. Specifically, the Settlement provides:

1. Total Room Price Modification to Calendar View

Within six (6) months of the Effective Date, Marriott will modify and change the calendar view on its Marriott US Websites so the cost identified for each calendar day is at least the lowest Total Room Price and not just the lowest available room rate.

2. Free Amenities Excluded from Resort Charges

Plaintiffs will give notice to Marriott within 90 days from the Effective Date of all known instances of a Marriott Hotel advertising an amenity as complimentary, free, or otherwise without charge that is also included as a Resort Fee which Marriott shall promptly modify and fix within six (6) months of the Effective Date.

3. Notice of Compliance to Marriott Hotels

Within six (6) months of the Effective Date, Marriott will notify and remind its Marriott Hotels that charge a Resort Fee that under Marriott's resort fee policy no amenity offered as complimentary, free, or otherwise without charge may be included as a Resort Fee amenity.

4. Request for Compliance to Marriott Hotels

Within six (6) months of the Effective Date, Marriott will instruct its Marriott Hotels that charge a Resort Fee to take such action as may be reasonably necessary to ensure they are not presently offering any complimentary or free amenity as a Resort Fee amenity.

5. Compliance Reporting

Within 10 days after the anniversary of the Effective Date, Marriott will serve on Class Counsel a declaration confirming and describing Marriott's compliance with the requirements of the terms of the Settlement Agreement.

C. Release

Under the terms of the Settlement, the named Plaintiffs *only* are releasing their claims against Marriott. The Settlement also waives the protections of Civil Code Section 1542 as to the named Plaintiffs *only*. Class Members are not releasing any claims of any kind they may have against Marriott.

D. Service Award to Plaintiffs

In recognition of Plaintiffs' time and effort as Class Representatives and the release of their claims, the Parties agree that subject to Court approval Marriott will pay each Plaintiff a service award not to exceed five thousand dollars.

E. Attorneys' Fees and Costs

The Parties also agree that subject to Court approval Marriott will pay attorneys' fees and costs to Plaintiffs' counsel in an amount of sixty-five thousand dollars as partial reimbursement for their costs in prosecuting the Action. Plaintiffs' counsel will submit a fee petition and proposed order prior to the final approval hearing.

F. Notice

The Parties agreed that if required by the Court[3] upon issuance of the Preliminary Approval Order Plaintiffs will provide notice of the Settlement and its terms and conditions and the relevant dates, including any objection deadlines, substantially in accordance with the information set forth on Exhibit A to the Settlement Agreement (the "Notice") on a webpage (the "Notice Page) to be maintained by Plaintiff counsel, Bursor & Fisher, P.A. for a period of not less than the

[3] Marriott is not incorrect when it points out that notice is not mandatory when a settlement does not bind a class through claim or issue preclusion. "[N]otice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously." Fed. R. Civ. P. 23(e)(1)(B) Advisory Committee's Note to 2003 Amendment. Nonetheless, based on the language of the Court's Minute Order setting the briefing schedule for approval of the Settlement (ECF No. 276), Plaintiffs are prepared to provide website notice unless the Court holds otherwise after submission of additional papers from Marriott.

30 day notice period set forth in ECF No. 276, or such other period of time as the Court may order. The Notice webpage will use search engine optimization to assist Class Members who want to find answers to questions about the Action and the Settlement.

The Notice includes, without limitation, (1) the date and time of the Final Approval Hearing, (2) information about objecting to the Settlement, (3) information about other dates and deadlines associated with the Settlement, (4) advising Class Members that if they wish to pursue this matter further, due to time sensitive and critical issues they are encouraged to contact another attorney of their choosing without delay and as soon as possible in order to preserve whatever rights they may have, and (5) relevant contact information for Class Counsel. Plaintiffs have agreed to pay the costs and expenses associated with giving Notice. Teel Decl., ¶ 27.

IV. APPLICABLE LEGAL STANDARDS

The Ninth Circuit maintains a "strong judicial policy" that favors the settlement of class actions. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Nonetheless, the Court must first "determine whether a proposed settlement is "fundamentally fair, adequate and reasonable" pursuant to Rule 23(e). *Dalton v. Lee Publ'ns, Inc.*, No. 08-CV-1072-GPC-NLS, 2015 WL 11582842, at *2 (S.D. Cal. March 6, 2015) (Curiel, J., presiding) (quoting *Stanton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). The initial decision to approve or reject a settlement lies in the sound and broad discretion of the trial judge. *Seattle*, 955 F.2d at 1276.

The *Manual for Complex Litigation* describes a three-step process for approving a class action settlement: (1) preliminary approval of the proposed settlement; (2) dissemination of any required notice of the settlement to class members; and (3) a final approval hearing. *Manual for Complex Litigation* § 21.63 (4th ed. 2004). At the preliminary approval stage, the Court must determine whether the settlement falls "within the range of possible approval". *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). The proposed settlement should be "taken as a whole, rather than the individual component parts" in determining overall fairness. *Hanlon v.*

Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Courts are not permitted to "'delete, modify, or substitute certain provisions'". *Id*. (quoting *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982)). The settlement "must stand or fall in its entirety." *Id.*

Plaintiffs' request the Court complete the first two steps of the settlement approval process and grant preliminary approval of the Settlement and, if required, order Notice be given to the Class Members on Class Counsel's website.

V. ANALYSIS

A. Confirmation of the Class for Settlement

The Class meets the requirements of Rule 23(a), Rule 23(c)(4), and as it applies to the certified issues only Class, Rule 23(b)(3). "Under what is known as the broad view, courts apply the Rule 23(b)(3) predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4). The broad view permits utilizing Rule 23(c)(4) even where predominance has not been satisfied for the *cause of action as a whole*. *See In re Nassau Cty. Strip Search Cases* , 461 F.3d 219, 227 (2d Cir. 2006) (permitting issue certification "regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement"); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4) [ ] and proceed with class treatment of these particular issues.") *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405 (6th Cir. 2018). *See also Gunnells v. Healthplan Servs.,Inc.*, 348 F.3d 417, 439–45 (4th Cir. 2003) (courts may employ Rule 23(c)(4) to certify a class as to one claim even though all of the plaintiffs' claims, taken together, do not satisfy the predominance requirement).

1. *The Class is Sufficiently Numerous*

Rule 23(a)'s numerosity requirement is satisfied where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[C]ourts generally find that the numerosity factor is satisfied if the class comprises 40 or more members, and will find that it has not been satisfied when the class comprises 21 or fewer." *In re Facebook, Inc., PPC Advert. Litig.,* 282 F.R.D. 446, 452 (N.D. Cal. 2012), *aff'd sub nom. Fox Test Prep v. Facebook, Inc.,* 588 F. App'x 733 (9th Cir. 2014); *see also Campbell v. Facebook Inc.,* 315 F.R.D. 250, 261 (N.D. Cal. 2016). In granting class certification, the Court noted the Class would likely include hundreds of thousands of consumers (ECF No. 180, 33:1-2) making joinder impracticable (ECF No. 180, 30:1-3) and satisfying the numerosity requirement. *Id*.

2. *Class Members Share Common Questions of Law and Fact*

The second requirement for certification asks if there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality is demonstrated when the claims of all class members "depend upon a common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes, et al.*, 564 U.S. 338, 350 (2011); *See also Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998).

The Court identified two class-wide questions common to the Class that can be answered by common proof: (1) "the key elements of Plaintiffs' CLRA claim are susceptible to common, class-wide proof that will allow the validity of the class's claims to be resolved in one stroke" (ECF No. 180, 34:3-4); and (2) "whether Marriott intentionally concealed resort fees in its booking flow can be determined in one stroke with evidence common to the entire class" (ECF 180, 36:3-4).

3. *Plaintiffs' Claims are Typical of the Class Members' Claims*

The typicality element of Rule 23(a) directs courts to focus on whether the plaintiff's claims or defenses "are typical of the claims or defenses of the class." Fed.

R. Civ. P. 23(a)(3). The test is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ambrosia v. Cogent Commun., Inc.,* 312 F.R.D. 544, 554 (N.D. Cal. 2016) (citations omitted). Representative claims are typical "if they are *reasonably coextensive* with those of absent class members; they need not be substantially identical." *Id.* (citation omitted). This requirement ensures that "the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N Am. LLC,* 617 F.3d 1168, 1175 (9th Cir. 2010) (citation omitted).

Plaintiffs' claims are typical of those of the Class. The Court held that after modifications to the Class definition, "no remaining concerns undermine Lead Plaintiffs' ability to serve as adequate and typical representatives of the modified putative class. Here, Lead Plaintiffs and the purported class allege the same losses caused by the same inadequate resort fee disclosures." ECF 180, 33:9-12. "Accordingly, the Court finds that [ ] Lead Plaintiffs' claims are typical of the class as modified by the Court." ECF 180, 20-22. The change in business practices achieved by the Settlement applies to Plaintiffs and Class Members equally.

4. *Plaintiffs and Class Counsel Adequately Represent the Class*

Rule 23(a)(4) permits class certification if the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This factor requires (1) that the representative plaintiffs do not have conflicts of interest with the class, and (2) that plaintiffs are represented by qualified and competent counsel. *Hanlon,* 150 F.3d at 1020. The Court has previously determined that Plaintiffs and Class Counsel will fairly and adequately protect the Class Members' interests. "Lead Plaintiffs, through their counsel, have vigorously prosecuted this action to date, including by sitting for depositions, defending against multiple dispositive motions, and seeking to certify the class. See Class Cert. at 16. Accordingly, the Court finds that

Lead Plaintiffs and proposed class counsel are adequate [ ]." ECF No. 180, 33:17-22. Nothing has changed in this regard.

Plaintiffs share the same interest as the other members of the Class, and there is no evidence of any conflict of interest between Plaintiffs and Class Counsel with other absent class members. Plaintiffs are also represented by qualified counsel who have been committed to the prosecution of this case from the outset. Class Counsel are experienced in complex litigation and class actions of similar size, scope, and complexity to this class action and have the resources necessary to see this litigation through to its conclusion. *See* Teel Decl., ¶ 31.

Plaintiffs and Class Counsel have vigorously litigated this action in order to protect the interests of the Class for all Class Members, as evidenced by, *inter alia*, their substantial motion practice and discovery requests. *See Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008) (finding adequacy met where plaintiffs "demonstrated their commitment to th[e] action" and their attorneys were "qualified to represent the class"). Since the Court's order granting class certification, Class Counsel have continued to vigorously litigate this action right up until the eve of trial, and have engaged in extensive settlement negotiations, further evidencing that Rule 23(a)'s adequacy requirements remain satisfied.

5. *The Class Satisfies Rules 23(a) and 23(c)(4), and As It Applies to the Certified Issues Only Class, Rule23(b)(3)*

Under Rule 23(c)(4), Rule 23(a)'s four requirements for certification must first be met. Then, "when appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). Accordingly, "[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23[(c)(4)] authorizes the district court in appropriate cases to isolate the common issues . . . and proceed with class treatment of these particular issues." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Here, the Class meets Rule 23's requirements of numerosity,

typicality, adequacy, and commonality. *See, e.g., Tasion Communications, Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 633 (N.D. Cal. 2015).

Next, in analyzing the predominance factor courts consider whether Plaintiffs have demonstrated that "the same evidence will suffice for each member to make a *prima facie* showing or the issue is susceptible to generalized, class-wide proof," or if "members of a proposed class will need to present evidence that varies from member to member." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). Here the Court determined the key elements of Plaintiffs' claims—deceptiveness, materiality, reliance, and intent—can be resolved on a class-wide basis. ECF No. 180, 37:17-19.

In determining whether certification of an issues class is appropriate, courts should also consider whether the adjudication of the certified issues would "accurately and efficiently resolve the question of liability, while leaving the potentially difficult issue of individualized damage assessments for a later day." *Valentino*, 97 F.3d at 1229; *see also Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1164 (9th Cir. 2014). The Settlement leaves individualized damage assessments for a later day and provides meaningful benefits to the Class by eliminating any risk Class Members and other consumers will be deceived about the Total Room Price for a stay at a Marriott Hotel.

B. Confirmation of Plaintiffs' Counsel As Class Counsel

When confirming the certification of the class for the Settlement, the Court must also reconfirm its appointment of class counsel. The relevant factors in deciding whether to reconfirm class counsel are: (1) the work counsel has done in identifying, investigating, and litigating claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel has and will continue to commit to representing the class. *See* Fed. R. Civ. P. 23(g)(1)(A).

The Court has previously found Class Counsel adequate to fairly protect the interests of the Class. ECF No. 180, 43:3-4. Plaintiffs now ask the Court to reconfirm

the appointment of Bursor & Fisher, P.A., the Law Offices of Ronald A. Marron, APLC, and the Law Office of Robert L. Teel as Class Counsel for the Settlement.

Class Counsel satisfy the criteria of Rule 23(g) because they have devoted—and will continue to devote—substantial resources to the case and a significant amount of time and effort to this litigation, through their motion practice, pursuit of discovery, and settlement discussions. *See* Teel Decl., ¶¶ 7 and 31. Class Counsel have extensive experience in complex litigation and class actions and have been appointed class counsel and worked on consumer class actions throughout the country. *See* ECF Nos. 144-6, 144-7, 144-8, and 144-9. Class Counsel have diligently and zealously conducted the litigation of the claims at issue in the Action and they will continue to do so throughout its conclusion. Accordingly, Bursor & Fisher, P.A., the Law Offices of Ronald A. Marron, APLC, and the Law Office of Robert L. Teel meet the requirements of Rule 23 and should be confirmed as Class Counsel.

C. The Proposed Settlement Merits Preliminary Approval

Rule 23(e) requires judicial approval of a proposed class action settlement based on a finding that the agreement is "fair, reasonable, and adequate." *See Lane v. Facebook, Inc.,* 696 F.3d 811, 818 (9th Cir. 2012). In assessing a settlement proposal, a district court is required to balance a number of factors, namely:

> "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 extent 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."

Lopez v. Mgmt. & Training Corp., No. 17cv1624 JM(RBM), 2019 WL 6829250, at *5 (S.D. Cal. Dec. 13, 2019) (Miller, J.) (quoting *Hanlon*, 150 F.3d at 1026). Preliminary approval of a settlement is appropriate "'[i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, 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.'" *Tableware*, 484 F. Supp. 2d at 1079 (quoting *Manual for Complex Litigation* § 30.44 (2nd ed. 1985)). The proposed settlement need not be ideal, but it must be fair and free of collusion and consistent with counsel's fiduciary obligations to the class. *Hanlon,* 150 F.3d at 1027; *See also Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575-76 (9th Cir. 2004).

A full fairness analysis is unnecessary at the preliminary approval stage because some of these factors may or may not be able to be fully assessed until the Court conducts a final fairness hearing. *Dalton*, 2015 WL 11582842, at *6. "At this preliminary approval stage, the court again need only 'determine whether proposed settlement is within the range of possible approval'" and thus, whether any required the notice to the class and the scheduling of a formal fairness hearing is appropriate. *Alberto v. GMR, Inc*., 252 F.R.D. 652, 666-67 (E.D. Cal. 2008) (citation omitted).

The court's primary concern "is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. Of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted). "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004).

As explained by the Supreme Court, "[n]aturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Here, the Settlement represents a fair, adequate, and reasonable result for the Class because they: (1) will receive notice of the Settlement and changes to Marriott's business practices; (2) will be given an opportunity to object; and (3) are not bound to release any rights or remedies they may have to seek and obtain monetary damages or any other relief.

The proposed Settlement also satisfies the applicable standards because it: (1) falls within the range of possible approval; (2) is the product of serious, informed, non-collusive negotiations; (3) has no obvious deficiencies; and (4) does not improperly grant preferential treatment to class representatives or segments of the class. *Lopez*, 2019 WL 6829250, at *5; *see also Sierra v. Kaiser Found. Hosps.*, No. 3:18-cv-00780-KSC, 2019 WL 5864170, at *9 (S.D. Cal. Nov. 7, 2019).

1. *The Settlement Is Within the Range of Possible Approval*

The Settlement is desirable for the Class, and well within the range of possible approval. To determine if the Settlement is within the range of possible approval, "courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). This requires an evaluation of the strength of Plaintiffs' case. *Id.*

The Settlement protects the Class's rights under the CLRA and other state laws by providing significant and meaningful changes to Marriott's business practice designed to eliminate virtually any risk the Class and other consumers will be deceived about the Total Room Price of a stay at a Marriott Hotel, *See*, *infra*, Section III, B. In contrast to the immediate benefits of the Settlement, the outcome of continued litigation, trial, and appellate proceedings is uncertain and could add years to this litigation. Marriott has vigorously denied—and continues to deny—any wrongdoing, and absent settlement Marriott would surely continue to defend this Action aggressively creating the possibility of prevailing at multiple different opportunities.

Although Plaintiffs and Class Counsel believe in the merits of their case, they recognize the numerous hurdles they could face should they continue to litigate. For instance, Plaintiffs face not only having to try their case again to a jury for damages, but also the distinct possibility (whatever probabilities one might assign to it) that the Ninth Circuit could reverse the order granting class certification. *See* ECF No. 218.

In addition, to recover any punitive damages at a subsequent bifurcated trial, intent would have to be proven by clear and convincing evidence. This could be a

challenging burden and would require a virtual retrial of the liability and intent issues before a different trier of fact because establishing both liability and a claim for punitive damages require a showing of intent, albeit under differing standards of proof.

There is a real risk that absent settlement Marriott could prevail at trial, or during any damages phase (whether bifurcated herein or in separate actions), or on appeal, resulting in no benefit to the Class. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (noting that the elimination of "[r]isk, expense, complexity, and likely duration of further litigation" are factors that weigh in favor of approval of settlement); *see also Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972) ("[I]n any case there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.").

Considering the substantial risk of further litigation and the meaningful change of business practices provided under the Settlement, the Settlement falls well within the range of possible approval. *See McDonald v. CP OpCo, LLC*, No. 17-cv-04915-HSG, 2019 WL 2088421, at *4 (N.D. Cal. Jan. 28, 2019) ("Additionally, difficulties and risks in litigation weigh in favor of approving a class settlement."); *See also Schofield v. Delta Air Lines, Inc.*, No. 18-cv-00382-EMC, 2019 WL 955288, at *5-*6 (N.D. Cal. Feb. 27, 2019) (noting "the potential vulnerabilities in Plaintiff's case" and finding the settlement consideration adequate for preliminary approval despite being a "very large discount on a possible recovery . . . based on statutory damages").

While Plaintiffs are confident in the strength of their claims for liability, Defendant is equally confident in its defenses, and Plaintiffs acknowledge there is a risk they could be unable to obtain a jury verdict. In addition, there is every indication that following trial Marriott will move to decertify the Class creating a risk of lengthy appeals after the jury trial proceedings are over and presenting further risks and delays.

Plaintiffs acknowledge the merits of their claims are balanced by the risk, expense, and complexity of their case, as well as the likely duration of further litigation.

"Settlement is favored where a case [such as this one] is complex and likely to be expensive, and lengthy to try." *Low v. Trump Univ., LLC*, 246 F. Supp. 3d 1295, 1301 (S.D. Cal. 2017) (citing *Rodriguez v. W. Publ'g Corp*., 563 F.3d 948, 966 (9th Cir. 2009)). These risk and delay factors support approval of the Settlement.

2. Adversarial Arms-Length Negotiations Led to the Settlement

Settlements that are the result of hard-fought litigation and arms-length negotiations among experienced counsel, such as this one, are entitled to an initial presumption of fairness. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d at 965 ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."). The proposed Settlement is the product of informed arms-length negotiations preceded by five years of adversarial litigation right up until the eve of trial involving the exchange of multiple sets of written discovery and thousands upon thousands of pages of documents, and extensive motion practice including discovery motions, cross-motions for summary judgment, and a motion for class certification. *See Ruch v. Am Retail Grp., Inc.*, No. 14-cv-05352-MEJ, 2016 WL 5462451, at *2-*8 (N.D. Cal. Mar. 24, 2016) (holding that the process by which the parties reached their settlement, which included "extensive pre-mediation exchanges of information" and "another several weeks negotiating the long form settlement agreement, with back and forth on the details of the settlement . . . weigh[ed] in favor of preliminary approval"); *See also Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) (settlement negotiations were not collusive where "the parties arrived at the settlement after engaging in extensive discovery and after fully briefing their respective motions for summary judgment").

Plaintiffs and Class Counsel have a full understanding of the strengths and weaknesses of Plaintiffs' claims and Defendant's defenses and are able to assess whether the change in business practices would substantially benefit the Class when weighed against the risks of continuing litigation. *See Harris*, 2011 WL 1627973, at *8. Further, the Settlement was reached only after the Parties participated in a day of

mediation with an experienced mediator, and multiple Court supervised continuing settlement conferences, all of which "further suggests that the parties reached the settlement in a procedurally sound manner and that it was not the result of collusion or bad faith by the parties or counsel." *Id.; See also Manouchehri v. Styles for Less, Inc.*, No. 14cv2521 NLS, 2016 WL 3387473, at *5 (S.D. Cal. June 20, 2016) ("A mediator's involvement during the course of settling a class action is evidence of arms-length, non-collusive negotiations"). The Settlement resulted from serious, informed, non-collusive negotiations and merits a presumption of fairness.

The recommendation of experienced counsel in favor of settlement also carries a "great deal of weight" in a determination of the reasonableness of a settlement. *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007). "The weight accorded to the recommendation of counsel is dependent on a variety of factors; namely, length of involvement in litigation, competence, experience in the particular type of litigation, and the amount of discovery completed." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §11:47 (4th ed. 2002).

Plaintiffs and Class Members are represented by counsel with extensive experience in complex litigation and class actions. Class Counsel believe the Settlement is a fair, adequate, and reasonable resolution for Class Members. As experienced attorneys in this field, their opinion weighs in favor of approval.

3. *The Settlement Has No Deficiencies*

The Settlement is free of any material defects. A court is likely to find a settlement free from obvious deficiencies when it provides a real, immediate benefit to the Class despite numerous risks. *See In re Tableware,* 484 F. Supp. 2d. at 1080.

As noted above, the change in Marriott business practices is significant in light of the serious risks Plaintiffs face in obtaining any relief for the Class. Plaintiffs face an appreciable risk that Marriott will move to decertify the Class, and if denied that on appeal the Ninth Circuit could reverse class certification. In addition, there are

significant costs associated with, and evidentiary hurdles to, establishing the requisite amount of intent to recover anything beyond very minimal compensatory damages.

Under the Settlement, Class Members receive an immediate, meaningful change in Marriott's business practices that fully remedies, without limitation, Marriott's failure to advertise the Total Room Price, not only in its booking flow, but also on its calendar page. "Based on th[e] risk and the anticipated expense and complexity of further litigation, the [C]ourt cannot say that the proposed settlement is obviously deficient." *In re Tableware,* 484 F. Supp. 2d at 1080.

4. *The Settlement Does Not Provide Preferential Treatment*

The Settlement does not give preferential treatment to any member of the Class, and provides a change in Marriott's business practices that applies equally to every Class Member (and the public). While the Settlement authorizes Plaintiffs to seek a service award for their roles as named Plaintiffs in this lawsuit, "the Ninth Circuit has recognized that service awards to named plaintiffs in a class action are permissible and do not render a settlement unfair or unreasonable." *Harris,* 2011 WL 1627973, at *9 (citing *Stanton v. Boeing Co.,* 327 F.3d 938, 977 (9th Cir. 2003)).

Although this Court will ultimately determine whether Plaintiffs are entitled to such an award and the reasonableness of the amount requested, the proposed award is not outside the range of reasonableness. *See e.g.*, *Beck-Ellman v. Kaz USA, Inc.*, No. 3:10-CV-02134-H-DHB, 2013 WL 10102326, at *7 (S.D. Cal. June 11, 2013) (approving $20,000 incentive award); *Fulford v. Logitech, Inc.*, No. 08-CV-02041, 2010 WL 807448, at *3 n.1 (N.D. Cal. 2010) (collecting cases awarding service payments ranging from $5,000 to $40,000). The absence of any preferential treatment supports preliminary approval of the Settlement.

5. *The Settlement Provides the Best Notice Practicable*

The second step of the approval process, if required by the Court, is to provide notice about the Settlement to the Class. *See Manual for Complex Litigation*, *supra*,

at §21.63. Notwithstanding Marriott's position that notice is not required,[4] the Court's minute order scheduling briefing for approval of the Settlement clearly contemplates notice and an opportunity for Class Members to object.[5] ECF No. 276. Plaintiffs have agreed to provide website notice of the Settlement to the Class to ensure Class Members will receive the best notice practicable about the Settlement. FRCP 23(c)(2).

Notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 314 (1950). "[T]he mechanics of the notice process are left to the discretion of the court subject only to the broad 'reasonableness' standards imposed by due process." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 120 (8th Cir. 1975).

Here, Class Counsel has agreed to host a website where Class Members can find Settlement-related documents and other pertinent information. The proposed Notice is plain, easily understood, and consistent with guidelines set forth by the Federal Judicial Center. *See* Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, Federal Judicial Center (January 1, 2020).[6]

The Notice also provides (a) neutral, objective, accurate, and complete information about the nature of the Action and the Settlement by describing the claims, (b) the definition of the Class, (c) the relief provided under the Settlement, (d) Class

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[4] Marriott asserts no notice to the Class is required under Rule 23 because the Settlement does not require Class Members to release any of their monetary, equitable, or other claims of any kind. Plaintiffs understand Marriott intends to submit papers to the Court supporting the conclusion that notice is not required by the Federal Rules of Civil Procedure for this Settlement and that approval may be completed in a single approval hearing before the Court.

[5] "3. Monday May 20, 2024 - Wednesday June 19, 2024: 30-day Notice Period for the parties to provide notice to the class as contemplated in the settlement agreement (this date will be adjusted if the Court does not grant preliminary approval on May 15, 2024)." ECF No. 276.

[6] https://www.fjc.gov/content/judges-class-action-notice-and-claims-process-checklist-and-plain-language-guide-0. [Last visited April 24, 2024.]

Members' option to object and appear at the Final Approval Hearing personally or through counsel, and (e) hyperlinks to all pertinent pleadings related to the Settlement. It also informs Class Members if they wish to pursue this matter, due to time sensitive and critical issues they should contact another attorney of their choosing without delay and as soon as possible in order to preserve whatever rights they may have.

The Settlement is not binding on any Class Members and therefore is not a "proposed settlement" under the Class Action Fairness Act, 28 U.S.C. §§ 1711(6).[7] No written notice of the proposed Settlement on the U.S. Attorney General or any California state official is required under 28 U.S.C. §§ 1715. Plaintiffs submit that the website Notice provides the best notice practicable under the circumstances and will be effective in informing Class Members who may be interested in the Action.

6. The Class is Not Bound and No Opt-Out Right is Necessary

As set forth in the Settlement and Notice, Class Members will have an opportunity to object to the Settlement. Teel Decl., ¶ 24. While Class Members are given an opportunity to *object* to the Settlement, Class Members are not bound in any way by the proposed settlement and there is no need for an opportunity to *opt-out*. FRCP 23(e)(1)(B) Advisory Committee's Note to 2003 Amendment.[8] Unlike Plaintiffs, Class Members are not bound under FRCP 23(e)(1)(B) and 23(e)(2) by the Settlement or the release, and there is therefore nothing to opt-out from.

Class Members' rights are protected by the mechanisms under Rule 23, namely (1) approval by the Court, and (2) if required by the Court, notice to the Class and a fairness hearing at which dissenters can voice their objections and thereafter seek review on appeal. Class Members are being given notice of the Settlement, ample

[7] "The term "proposed settlement" means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members." 28 U.S.C. § 1711(6).

[8] "Individual notice is appropriate, for example, if class members are required to take action—such as filing claims—to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3)." Here, Class Members are not required to take any action to participate in the Settlement.

opportunity to object, and an explicit warning that if they wish to pursue this matter further due to time-sensitive and critical issues they should contact another attorney of their choosing without delay. Nothing more is required.

VI. THE PROPOSED SCHEDULE OF EVENTS

Unless the Court dispenses with notice and a final hearing, the last step in the settlement process is to hold a Final Approval Hearing at which the Court will make a final decision about whether to approve the Settlement pursuant to Rule 23(e)(3). *See Manual for Complex Litigation*, *supra*, at § 21.63. Plaintiff has lodged a proposed order concurrently with this motion, pursuant to Local Civil Rule 7.2(c), setting forth the proposed schedule of events from here through final approval. Plaintiffs submit the Court may enter the proposed order without a hearing, unless the Court has questions, especially given the Court may hold a Final Approval Hearing if Class Members are given notice and an opportunity to weigh in. Plaintiffs confirm the following schedule (ECF No. 276) subject to the Court's convenience:

Deadline for publishing the Notice webpage	May 20, 2024 (or 5 calendar days after entry of the proposed order)
Deadline for Class Members to object to the Settlement	June 19, 2024 (or 30 calendar days after entry of the proposed order)
Deadline for filing a final approval motion and application for attorney fees and costs and service awards	July 3, 2024 (14 calendar days after the end of the notice period)
Final Approval Hearing	July 10, 2024 (7 calendar days after filing the final approval motion, at the Court's convenience)

Plaintiffs respectfully submit that this proposed schedule complies with Rule 23 while securing timely relief for Class Members.

VII. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court grant their motion for preliminary approval and enter an order substantially in the form of the

proposed order lodged concurrently herewith: (1) confirming the Class for purposes of the Settlement; (2) confirming the appointment of Todd Hall and George Abdelsayed as Class Representatives; (3) confirming the appointment of Bursor & Fisher, P.A., the Law Offices of Ronald A. Marron, APLC, and the Law Office of Robert L. Teel as Class Counsel; (4) granting preliminary approval of the proposed Settlement; (5) and scheduling the final approval hearing.

Dated: May 10, 2024

Respectfully submitted,

By: */s/ Robert L. Teel*

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