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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

CLASS ACTION

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

Date: July 10, 2024
Time: 9:30 a.m.
Ctrm: 4C
Judge: Hon. Jinsook Ohta

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On May 17, 2024, this Court entered its Order preliminarily approving a Class Action Settlement[1] between Plaintiffs Todd Hall and George Abdelsayed (collectively "Plaintiffs"), on behalf of themselves and the Class they represent, and Defendant Marriott International, Inc. ("Marriott"). ECF No. 282. The Settlement should now receive the Court's final approval because it is demonstrably fair, reasonable, and adequate and meets all the requirements for approval under Fed. Rule Civ. Proc. ("FRCP") 23(e). *See* Settlement Agreement attached as Exhibit 1 to the declaration of Robert Teel in support of Plaintiffs' motion for preliminary approval. ECF No. 279-3.

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, Plaintiffs and Marriott reached the Settlement whereby Marriott has agreed to implement substantial business changes to ensure that Class Members and the public will not be deceived about the Total Room Price for a stay at a Marriott Hotel.

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

[1] Capitalized terms shall have the same meaning as set forth in the Class Action Settlement Agreement attached as Exhibit 1 to the declaration of Robert Teel in support of Plaintiffs' motion for preliminary approval (ECF No. 279-3) unless otherwise noted.

1 amenity; (4) request its Marriott Hotels that charge a Resort Fee take commercially
2 reasonable actions to ensure that they are not presently offering any complimentary or
3 free amenity as a Resort Fee amenity; and (5) to ensure compliance with the
4 Settlement's requirements, serve on Class Counsel a declaration twelve (12) months
5 after the Effective Date describing and informing Class Counsel of its compliance in
6 connection with the terms of the Settlement.

7 Securing the behavioral relief and change in Marriott's business practices is
8 important and beneficial and valuable to the Class. Plaintiffs' determination that it is
9 in the best interests of the Class to forego a liability-only trial and eliminate the
10 likelihood of protracted appellate proceedings in order to immediately eliminate
11 virtually any risk Class Members will be deceived about the Total Room Price of a stay
12 at a Marriott Hotel is based in part on recognition that the Court's certification of the
13 Class was for liability issues only. Plaintiffs similarly determined that this Court's
14 April 16, 2024 Order (ECF No. 270) instructing them they would have separate trials
15 on liability and damages created a meaningful risk that even if they prevailed on
16 liability, it would likely be years before they and Class Members would be able to
17 pursue their damages claims.

18 The Settlement is the product of extensive arms-length negotiations that took
19 place over eight months with the assistance of an experienced mediator and Magistrate
20 Allison H. Goddard. The Settlement was negotiated by lawyers with a depth of
21 experience in consumer protection cases and in class action litigation more broadly,
22 and was reached only after the parties were well-informed of all relevant facts and the
23 strengths and weaknesses of Plaintiffs' case (and of Marriott's defenses), and after
24 Plaintiffs' counsel could be reasonably certain that the Settlement represents the best
25 possible result for the Class given the circumstances of this case. Consequently, the
26 Settlement satisfies all applicable criteria for final approval.

27 For the reasons below, and those stated in Plaintiffs' Motion for Preliminary
28 Approval of Settlement (ECF No. 279), Plaintiffs ask that the Court confirm

certification of the Class for settlement, find the Settlement is fair, reasonable and adequate under FRCP 23, and grant final approval of the Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

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 the parties continued with discovery in earnest.

B. The Parties Engaged in Substantial Discovery

Extensive discovery ensued, including the exchange of multiple sets of written interrogatories and requests for admission, the production of hundreds of thousands of pages of documents, and the issuance of third-party discovery. The parties filed several motions to resolve discovery disputes that arose over the course of the Action,

including 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 a discovery dispute relating to the second deposition of since dismissed plaintiff Kevin Branca. *See, e.g.*, ECF Nos. 84, 93, 101, 106, 107, 116, 122, 126, and 164.

C. The Parties' 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 that 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 (1) Plaintiffs lack standing to seek injunctive relief, and (2) the Court lacks jurisdiction over Plaintiffs' equitable claims for restitution in connection with their CLRA, FAL, UCL, and unjust enrichment causes of action. ECF No. 180, 9:7-11. As a result of the foregoing, only the named Plaintiffs' individual claims seeking actual and punitive damages under the CLRA and for concealment were allowed to proceed.

D. The Parties' Settlement Negotiations and Preliminary Approval

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 and executed Settlement Agreement dated May 9, 2020. At all times the settlement negotiations referred to herein were adversarial, non-collusive, and conducted at arms-length.

On May 17, 2024, the Court issued its Order granting preliminary approval of the proposed Settlement. The Court reserved on the issue of service awards to the class representative and reimbursement of partial litigation costs, but otherwise found the Settlement appeared fair, reasonable and adequate, and within the range of reasonableness for preliminary approval. ECF No. 282, 2:3-12.

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 relief by requiring Marriott to change its business practices in a way 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. Litigation Costs and Expenses and Incentive Award to Plaintiffs

The Settlement Agreement provides that Marriott will pay up to $75,000 for partial reimbursement of Litigation costs and expenses and service awards, including an award to the Class Representatives of up to five thousand dollars each and the balance for Litigation costs and expenses (sixty-five thousand dollars), subject to Court approval as further set forth in the Settlement Agreement. The reasonableness of this request is discussed in Plaintiffs' Motion for Approval of Payment For Partial Reimbursement of Litigation Costs and Service Awards (the "Costs Motion") filed in conjunction herewith.

D. The Release

Under the terms of the Settlement Agreement, the named Plaintiffs only are releasing their claims against Marriott. The Settlement Agreement also waives the protections of Civil Code Section 1542 as to the named Plaintiffs only. Other than the named Plaintiffs, no other Class Member is releasing any claims of any kind that she, he, or it may have against Marriott.

IV. NOTICE HAS BEEN FULLY DISSEMINATED TO THE CLASS

The Class Notice was issued on the settlement website[2] and has been administered by Class Counsel, Bursor & Fisher, P.A., in accordance with its design and as required under the terms approved by the Court. *See* Declaration of Robert Teel in Support of Motion for Final Approval of Class Action Settlement filed concurrently herewith ("Teel Decl.") ¶¶ 5 and 7. The notice procedure is consistent with the class action notice plan that was approved by this Court and constitutes the best notice practicable under the circumstances.

On May 20, 2020 Class Counsel published the Notice on its website. *Id.* at ¶ 5. The webpage has since been continuously maintained by Class Counsel and sets forth the Notice, the Settlement Agreement, and all other information required under the

[2] https://www.bursor.com/hall-v-marriott-international-inc-important-settlement-information/

Settlement Agreement. *Id.* at ¶ 5-7. The Notice includes the date and time of the final approval hearing, how to object to the Settlement, information about important dates and deadlines associated with the Settlement, and relevant contact information. *Id.* at ¶ 5. *See also* Exhibit A to the Settlement Agreement. ECF No. 279-3, pgs. 17-19.

The Settlement is not binding on any Class Members other than Plaintiffs and is not a "proposed settlement" under the Class Action Fairness Act, 28 U.S.C. §§ 1711(6).[3] 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.

V. THERE ARE NO OBJECTIONS

Because this Settlement Agreement does not bind anyone other than Plaintiffs, Class Members may not exclude themselves or opt-out of the Settlement Agreement. *See* Settlement Agreement, pg. 8, Article V, F. (ECF No. 279-3, pg. 19). Unlike the named Plaintiffs, Class Members are not being bound under FRCP 23(e)(1)(B) and 23(e)(2) by the release, and thus there is nothing for them to opt out from.

While Class Members may not opt out, Class Members can object to the Settlement. The deadline to object was June 16, 2024 (30 days after the date of the preliminary approval Order).[4] *See* Teel Decl., ¶ 7. No objections to the Settlement have been submitted as of the date of this filing. *Id.*

VI. THE SETTLEMENT SHOULD RECEIVE FINAL APPROVAL

The Ninth Circuit has a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Linney v. Cellular*

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[3] "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).

[4] The preliminary approval Order also states that any such objections must be made in accordance with the terms set forth in the Class Notice and will be timely only if postmarked no later than 35 days after the date of this Order granting preliminary approval of this Settlement. The timeliness of objections and notices shall be conclusively determined by the postmark date. ECF No. 282, § 10. In addition to the foregoing, the notice also states Class Members may file with the Court objections to the Settlement by July 3, 2024. ECF 279-3, pg. 19.

1 *Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998) (quoting *Class Plaintiffs v. City of*
2 *Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). Approval of a proposed class action
3 settlement is governed by FRCP 23(e) which requires the district court's approval. The
4 focus of the Court's inquiry here is "whether a proposed class action is 'fair, reasonable,
5 and adequate.'" *Moreno v. Beacon Roofing Supply Inc.*, No. 19-cv-185-GPC(LL),
6 2020 WL 1139672, at *5 (S.D. Cal. Mar. 9, 2020).

7 Rule 23(e) provides that the Court may approve a class action settlement "only
8 after a hearing and only on a finding that it is fair, reasonable, and adequate after
9 considering whether: (a) the class representatives and class counsel have adequately
10 represented the class; (b) the proposal was negotiated at arm's length; (c) the relief
11 provided for the class is adequate, taking into account: (i) the costs, risks, and delay of
12 trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to
13 the class, including the method of processing class-member claims; (iii) the terms of
14 any proposed award of attorney's fees, including timing of payment; and (iv) any
15 agreement required to be identified under Rule 23(e)(3); and (d) the proposal treats
16 class members equitably relative to each other." FRCP 23(e)(2).

17 Under Rule 23(e), the "primary concern . . . is the protection of those class
18 members, including the named plaintiffs, whose rights may not have been given due
19 regard by the negotiating parties." *Mauss v. NuVasive, Inc.*, No. 13-cv-2005-JM(JLB),
20 2018 WL 6421623, at *3 (S.D. Cal. Dec. 6, 2018) (J. Miller) (quoting *Officers for*
21 *Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982)). "[T]he question is
22 not whether the final product could be prettier, smarter or snazzier, but whether it is
23 fair, adequate and free from collusion." *Mauss*, 2018 WL 6421623, at *3 (citing
24 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998)). In making this
25 determination, the court considers a number of factors, including: the strength of
26 plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation;
27 the risk of maintaining class action status throughout the trial; the amount offered in
28 settlement; the extent of discovery completed, and the stage of the proceedings; the

1 experience and views of counsel; the presence of a governmental participant; and the
2 reaction of the class members to the proposed settlement. *Id*., citing *Officers for Justice*,
3 688 F.2d at 624.

4 **A. <u>Plaintiffs and Class Counsel Have Adequately Represented the Class</u>**

5 Rule 23(e)(2)(A) requires the Court to consider whether "the class
6 representatives and class counsel have adequately represented the class."
7 FRCP 23(e)(2)(A). This analysis is "redundant of the requirements of Rule 23(a)(4)
8 and Rule 23(g), respectively." Final approval criteria—Rule 23(e)'s multifactor test, 4
9 *Newberg on Class Actions* § 13:48 (5th ed.). Determining adequacy of representation
10 requires that "two questions be addressed: (a) do the named plaintiffs and their counsel
11 have any conflicts of interest with other class members and (b) will the named plaintiffs
12 and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego*
13 *Fin. Corp. Sec. Litig*., 213 F.3d 454, 462 (9th Cir. 2000), as amended (June 19, 2000)
14 (citing *Hanlon*, 150 F.3d at 1020); *see also Hefler v. Wells Fargo & Company*, No. 16-
15 cv-05479-JST, 2018 WL 6619983, at *6 (N.D. Cal. Dec. 18, 2018).

16 There is no evidence of any conflict of interest between Plaintiffs and Class
17 Counsel with other absent Class Members. Each of the named Plaintiffs have
18 prosecuted this action vigorously on behalf of the Class and each has kept themselves
19 informed about the status of proceedings. ECF No. 279-2, 11:10-26. *See also*
20 Declarations of Plaintiffs Todd Hall and George Abdelsayed in support of the Costs
21 Motion filed in conjunction herewith. Additionally, each of the named Plaintiffs
22 participated in the settlement negotiations and were deposed at length. *Id*. Lastly, each
23 of the named Plaintiffs suffered the same injuries as the absent class members because
24 they were exposed to the same business and advertising practices. *See generally* Third
25 Amended Complaint, ECF No. 82. The named Plaintiffs have adequately represented
26 the Class.

27 Class Counsel have also vigorously represented the Class and have no conflicts
28 of interest. The Settlement was negotiated by counsel with extensive experience in

consumer class action litigation. *See* ECF No. 144-6 through 144-9. Through their substantial motion practice and discovery requests, Class Counsel obtained sufficient information and documents to evaluate the strengths and weaknesses of the case. ECF No. 279-2, 2:19-27; *see also* Final approval criteria—Rule 23(e)(2)(A): Adequate representation, 4 *Newberg on Class Actions* § 13:49 (5th ed.) ("if extensive discovery has been done, a court may assume that the parties have a good understanding of the strengths and weaknesses of their respective cases and hence that the settlement's value is based upon such adequate information."). Based on their experience, Class Counsel concluded that the Settlement provides immediate beneficial results for the Class Members while sparing them from the uncertainties of continued and protracted litigation. ECF No. 279-2, 6:20-28 and 7:1-4; *See, e.g., Bellinghausen v. Tractor Supply Company*, 306 F.R.D. 245, 257 (N.D. Cal. 2015) (J. Miller) ("Given counsel's experience in this field, his assertion that the settlement is fair, adequate, and reasonable support final approval of the settlement."); *In re Omnivision Techs*., Inc., 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.") (citing; *Rodriguez v. W. Publ'g Corp*., 563 F.3d 948, 976 (9th Cir. 2009) (Deference to Class Counsel's evaluation of the Settlement is appropriate because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation."). The requirement for adequacy of Class Counsels' representation is satisfied.

1. *The Settlement was Negotiated at Arm's Length*

Rule 23(e)(2)(B) requires the Court to consider whether "the proposal was negotiated at arm's length." FRCP 23(e)(2)(B). "This inquiry aims to root out settlements that may benefit the plaintiffs' lawyers at the class's expense, sometimes called 'collusive settlements.'" Final approval criteria—Rule 23(e)(2)(B): Arm's length negotiation, 4 *Newberg on Class Actions* § 13:50 (5th ed.). Here, the proposed Settlement is the product of informed arms-length negotiations because it was preceded

by nearly five years of adversarial litigation involving substantial discovery, including the exchange of multiple sets of written discovery and hundreds of thousands of pages of documents, and extensive motion practice, including various discovery motions, dueling motions for summary judgment, and a motion for class certification. *See Mauss v. NuVasive, Inc.*, No. 13-cv-2005-JM(JLB), 2018 WL 6421623, at *4 (S.D. Cal. Dec. 6, 2018) (J. Miller) (settlement negotiations were not collusive where the parties arrived at settlement after "four years of extensive investigation, discovery, and motion practice, after which the parties engaged in arms'-length negotiations before a mediator"). At the time of Settlement, Plaintiffs and Class Counsel had a full understanding of the strengths and weaknesses of Plaintiffs' claims and Defendant's defenses and were able to assess whether the change in business practices and related relief would adequately benefit the class when weighed against the risks of continuing litigation. *Id*. at *11 (finding that after "years of extensive litigation," the record was "sufficiently developed and complete to have enabled the Plaintiffs and the Defendants to have adequately evaluated and considered their positions).

Moreover, the Settlement was reached only after the parties participated in an in-person mediation session before an experienced mediator, and several months of continued settlement discussions supervised by Magistrate Allison H. Goddard—all of which further suggests that the Settlement was not the result of collusion or bad faith by the parties or counsel. *See Chiaramonte v. Pitney Bowes, Inc*., No. 06-cv-1507-JM(NLS), 2008 WL 510765, at *2 (S.D. Cal Feb. 25, 2008) (J. Miller) ("The court further finds that the settlement has been reached as a result of intensive, serious, and non-collusive arms-length negotiations, including voluntary, non-binding mediation before an experienced mediator.")

The recommendation of experienced counsel in favor of settlement also carries a "significant weight" in a court's determination of the reasonableness of a settlement. *Id*. at *6. "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 (Bursor & Fisher, P.A., the Law Offices of Ronald A, Marron, APLC, and the Law Office of Robert L. Teel). Class Counsel believe that the settlement provides fair, adequate, and reasonable relief for Class Members. As Class Counsel are experienced attorneys in this field, their opinion that the Settlement is fair, adequate, and reasonable for Class Members also weighs in favor of approval of the Settlement. Accordingly, the Court may presume that the Settlement is fundamentally fair and was negotiated at arm's length by competent counsel who are experienced in class action litigation.

2. The Relief Provided Is Fair, Reasonable, and Adequate

Rule 23(e)(2)(C) requires that the Court consider whether "the relief provided for the class is adequate, taking into account: (a) the costs, risks, and delay of trial and appeal; (b) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (c) the terms of any proposed award of attorney's fees, including timing of payment; and (d) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C). "Before the Rule arrives at the articulation of sub-factors, its general directive asks whether the class's relief is adequate." Final approval criteria—Rule 23(e)(2)(C): Adequate relief, 4 *Newberg on Class Actions* § 13:51 (5th ed.). "In evaluating the value of the class members' claims, the court need not decide the merits of the case nor substitute its judgment of what the case might be worth for that of class counsel; however, 'the court must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness.'" *Id*. (Citation omitted.)

The proposed Settlement provides significant and meaningful behavioral relief that is designed to eliminate virtually all risk that Class Members will be deceived about the Total Room Price of a stay at a Marriott Hotel, thereby protecting not only

1 the consumer rights of the Class, but also of the public. This is a materially beneficial
2 and significant result for the Class considering the risks Plaintiffs face if they were to
3 take the case to trial. Further, while all members of the Class and public will benefit
4 from the Settlement, no Class Members (excluding the Class Representatives) are
5 bound to release any rights they may have to seek and obtain monetary damages or
6 other relief from Marriott.

7 **3. *Costs, Risks, and Delay Support Final Approval***

8 In contrast to the tangible, immediate benefits of the relief obtained by the
9 Settlement, the outcome of continued litigation, trial, and appeal is uncertain and could
10 add years to this Litigation before Plaintiffs and Class Members would even have an
11 opportunity to seek damages, win or lose at the liability-only jury trial. Such
12 considerations have been found to weigh heavily in favor of settlement. *See Rodriguez*,
13 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, No. C 06-3903 TEH,
14 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity,
15 delay, risk and expense of continuing with the litigation and will produce a prompt,
16 certain, and substantial recovery for the Plaintiff class."). Marriott has vigorously
17 denied—and continues to deny—any wrongdoing, and absent settlement Marriott
18 would surely continue to defend this Action aggressively, with the opportunity to
19 prevail at multiple different procedural opportunities (including without limitation at
20 the liability trial, during appellate proceedings, and at any subsequent damages trials).

21 Indeed, although Plaintiffs and their counsel believe in the merits of their case,
22 they recognize the numerous hurdles they could face should they continue to litigate
23 the action. Because the Court (a) rejected all but two of Plaintiffs' claims on summary
24 judgment, (b) found it did not have jurisdiction over Class's equitable relief claims, (c)
25 certified a Rule 23(c)(4) liability-only class, and (d) instructed Plaintiffs that their
26 individual compensatory and punitive damages claims would not be determined by the
27 jury at the April 22, 2024 trial, absent the Settlement Plaintiffs and other Class
28 Members would be unable to obtain any behavioral remedies in this Action and would

have to return to court to prove damages even if Plaintiffs prevailed at trial on the issue of liability on a Class-wide basis. This could be a challenge because Marriott has consistently maintained that their defenses to both liability and damages required individualized inquiries into the nature of each Class Member's claims (*e.g*., actual reliance, whether their stay at a Marriott Hotel was for family, personal, or household purposes, proof of damages, etc.). *See* ECF No. 218. In short, there is a genuine risk that absent the Settlement, Marriott could prevail on a host of substantive and procedural issues at trial or on appeal resulting in no relief at all. *See Rodriguez v. W. Publ'g Corp*., *supra* at 966 (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.").

While Plaintiffs are confident in the strength of their claims for liability, Defendant is equally confident in its defenses, and based on the foregoing Plaintiffs acknowledge there is a risk they could be unable to obtain a jury verdict for Class-wide liability (and eventually their individual damages) against Defendant. Even if they prevailed on Class-wide liability, Plaintiffs face the risk of lengthy appeals after the liability proceedings were completed before they could even get back in front a jury to try their individual damages claims. Finally, there is a possibility that following the appellate proceedings, the Court would decide to decertify the Class in whole or in part, presenting further risks and delays. The Settlement eliminates these risks by ensuring Class Members obtain relief now that is certain and immediate which eliminates the risk that they would be left without any benefit at all. *Fulford v. Logitech, Inc.*, No. 08-cv-02041 MNC, 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010).

4. *There Is No Method of Distribution For Behavioral Remedies*

The Settlement Agreement only provides for behavioral remedies relief that applies equally to every Class Member and the public. Because the Class is certified for liability only issues under Rule 23(c)(4), and there are no damages to be paid under the Settlement Agreement, there is no need for a method of distribution of the relief.

5. *Requested Costs and Service Awards are Fair and Reasonable*

Class Counsel will more fully address the reasonableness of the request for litigation costs and expenses in the Costs Motion being filed in conjunction herewith. In short, Class Counsel are seeking a total of $75,000 in litigation costs ($65,000) and service awards ($5,000 each) for the Class Representatives and to partially reimburse Class Counsel for less than a third of their Litigation costs and expenses. As a baseline, incentive awards of $5,000 have been found to be presumptively reasonable. *See Vikram v. First Student Management, LLC,* No. 17-cv-04656-KAW, 2019 WL 4168992, *5-6 (N.D. Cal. Sept. 3, 2019). But incentive awards beyond $5,000 have also been found to be reasonable under certain circumstances, including cases as here involving financial and reputational risk and harm and where a strong commitment to the class is shown. "Numerous courts in the Ninth Circuit and elsewhere have [also] approved incentive awards of $20,000 or more where, as here, the class representative has demonstrated a strong commitment to the class." *Id.* (citing *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV-08-01365 CW, 2010 WL 1687832, at *17 n.8 (N.D. Cal. Apr. 22, 2010) (collecting cases approving incentive awards of $25,000 to named plaintiffs who were deposed; $35,000 to $55,000 award in estimated $18,000,000 settlement action; $20,000 award in estimate $4,000,000 settlement action)).

6. *Other Agreements*

Rule 23(e)(3) requires that the Parties "must file a statement identifying any agreement made in connection with the [settlement] proposal." There are no such agreements to disclose other than the Settlement Agreement.

B. The Proposed Settlement Treats Class Members Equitably

Rule 23(e)(2)(D) requires the Court to consider whether the Settlement Agreement "treats class members equitably relative to each other." FRCP 23(e)(2)(D). "A distribution of relief that favors some class members at the expense of others may be a red flag that class counsel has sold out some of the class members at the expense of others, or for their own benefit." Final approval criteria—Rule 23(e)(2)(D): Intra-class equity, 4 *Newberg on Class Actions* § 13:56 (5th ed.). Here, the behavioral relief from the Settlement will benefit each Class Member equally. While the Settlement Agreement authorizes Plaintiffs to seek a service award for their role as named plaintiffs in this lawsuit, "[s]ervice awards to named plaintiffs are 'fairly typical in class action cases.'" *Reynolds v. Direct Flow Medical, Inc.*, No. 17-cv-00204-KAW, 2019 WL 4168959, at *6 (N.D. Cal. Sept. 3, 2019) (citing *Rodriguez v. W Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). 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 v. Vector Mktg. Corp.*, 2011 WL 1627973, at *9 (N.D. Cal. Apr. 28, 2011) (citing *Stanton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)). Plaintiffs will further discuss the reasonableness of the service award requests in their Costs Motion.

C. The Reaction of the Class to the Settlement Has Been Favorable

It is well established that "the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) (collecting cases). Here, as measured by the total absence of objections, the response from Class Members can be characterized as overwhelmingly favorable.

As of the date of this filing, no objections have been received. Teel Decl., ¶ 7. "'It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class

settlement action are favorable to the class members.'" *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1043 (quoting *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528-29); *see also Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010) ("[A] small number of class members seeking exclusion or objecting indicates an overwhelming positive reaction of the class."). That presumption applies here.

VII. THE CLASS SHOULD BE CERTIFIED FOR FINAL APPROVAL

A. The Class Satisfies Rule 23(a)

The Court's Preliminary Approval Order provisionally certified a Settlement Class defined as "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 was certified on March 30, 2023 excluding Defendant and Defendant's officers, directors, employees, agents and affiliates, the Court and its staff, and attorneys appearing in this action." ECF No. 282, 3:18-25. The Class continues to meet the requirements of Rule 23 and should be certified for final approval.

1. *The Class is Sufficiently Numerous*

Rule 23(a)'s first requirement—numerosity—is satisfied where "the class is so numerous that joinder of all members is impracticable." FRCP 23(a)(1). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members, but not satisfied when membership dips below 21." *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000). In its Order 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.* The numerosity requirement continues to be satisfied.

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

The second requirement of class certification asks whether there are "questions of law or fact common to the class." FRCP 23(a)(2). Commonality is construed permissively and 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). Because the commonality requirement may be satisfied by a single common issue, it is easily met. 1 H. Newberg & Conte, *Newberg on Class Actions* § 3.10, at 3-50 (1992).

The Court previously 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). The commonality requirement for the Class continues to be met.

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

The third element of Rule 23(a)—typicality—directs courts to focus on whether the plaintiff's claims or defenses "are typical of the claims or defenses of the class." FRCP 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *See Hanlon*, 150 F.3d at 1020. In short, to meet the typicality requirement, the representative plaintiffs simply must demonstrate that the members of the settlement class have the same or similar grievances. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

Plaintiffs' claims are typical of those of the Class. The Court previously held that "Lead Plaintiffs' claims are typical of the class as modified by the Court." ECF No. 180, 20-22. As such, the change in business practices and behavioral relief achieved by the Settlement applies to Plaintiffs and other members of the Class equally and the typicality requirement continues to be met.

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

The final requirement of Rule 23(a) is set forth in subsection (a)(4) which requires that the representative parties "fairly and adequately protect the interests of the class." FRCP 23(a)(4). Adequacy of the Class Representatives and Class Counsel was fully addressed in Section VI(A) above and need not be repeated here. The adequacy requirement continues to be met.

B. The Class Satisfies Rule 23(b)(2)

In addition to satisfying the four requirements for certification under Rule 23(a),the Class also satisfies the additional requirement imposed under Rule 23(b)(2) that Defendant has "acted or refused to act on grounds that apply generally to the class," thereby making the behavioral relief called for under the Settlement appropriate. FRCP 23(b)(2). The key here is the indivisible nature of the behavioral remedy and the fact that the conduct is such that it can be remedied either only as to all of the class members or as to none of them.'" *Dukes*, 564 U.S. at 360 (citation omitted).

In the instant matter, the Settlement provides behavioral remedy relief to each member of the Class. The Settlement requires Marriott to change the 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. The Settlement also requires Marriott to (1) notify all Marriott Hotels that charge a Resort Fee that no amenity offered as free may be included as a Resort Fee amenity, and (2) promptly modify and fix all instances of which Defendant is notified by Class Counsel where a Marriott Hotel is advertising as free an amenity covered by a Resort Fee. These requirements benefit all Class Members (and indeed the public).

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IX. CONCLUSION

For the reasons stated above, the Court should grant final approval of Plaintiffs' motion for class action settlement with Defendant Marriott International, Inc. and enter an order substantially in the form of the proposed order lodged in conjunction herewith granting final approval of the proposed Settlement.

Dated: July 3, 2024

Respectfully submitted,

By: */s/ Robert L. Teel*

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