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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jane V.; John A.; John E.; Jane F.; John D.; John M.; Jane N.; and John W.; individually and on behalf of all others similarly situated,,

Plaintiff,

v.

Motel 6 Operating L.P., a limited partnership; G6 Hospitality LLC, a limited liability company, dba Motel 6; and Does 1-10,

Defendant.

No. 2:18-cv-00242-DGC

JOINT MOTION FOR AN ORDER (1) GRANTING PRELIMINARY APPROVAL OF AMENDED CLASS ACTION SETTLEMENT, (2) CONDITIONALLY CERTIFYING SETTLEMENT CLASS, (3) APPOINTING CLASS REPRESENTATIVES AND CLASS COUNSEL, (4) APPROVING NOTICE PLAN, AND (5) SETTING FINAL APPROVAL HEARING

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I. INTRODUCTION

Following the Court's January 30, 2019 Order (the "Order") and subsequent additional discussions between the Parties, the Parties submit this brief providing additional information to the Court and seeking preliminary approval of their proposed amended class action settlement.[1] In summary, the Agreement provides:

- Defendants will maintain a Policy, enforceable through a three-year consent decree, that they shall not share Guest Information with Federal Immigration Authorities without a judicially enforceable warrant or subpoena, except in exigent circumstances.
- Defendants will create an online mechanism for any person to report any perceived violation of that Policy.
- Defendants will provide training to all employees with the ability to make a guest list available regarding the Policy and resources available to them when guidance is needed.
- Defendants will pay up to Ten Million Dollars ($10,000,000) in damages to: 1) Motel 6 Registered Guests whose Guest Information was shared with Federal Immigration Authorities; and 2) Motel 6 Guests who were not Registered Guests but who were questioned, interrogated, detained, and/or placed in immigration removal proceedings by Federal Immigration Authorities as a result of the disclosure of Guest Information to Federal Immigration Authorities.

The Parties also have agreed to modify and expand the proposed classes in three material ways. First, the new settlement includes *all* Motel 6-branded properties, including Franchised Locations, while the prior proposed settlement included only Motel 6 properties operated by Defendants. Second, the proposed class period covered by the settlement has been expanded by two years to begin in February 2015. Third, the class definitions have been revised so there are now two classes (instead of the previous three), and they have been defined based on whether the claimant was a registered guest whose information was disclosed (the "Primary Class"), or another person who was not a registered guest but who experienced an encounter with Federal Immigration Authorities as a result of the disclosure of a Registered Guest's information ("Class 2").

[1] All initial-capped words refer to the terms and definitions in the amended settlement agreement ("Agreement").

The proposed settlement satisfies all the criteria for preliminary approval under federal law. Accordingly, the Parties request that the Court conditionally certify the proposed Settlement Class, preliminarily approve the settlement, approve and direct distribution of notice in the form presented in the exhibits filed with this motion, and approve the schedule for the Final Approval Hearing.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

This action arises as a result of the publication of a September 2017 article in the *Phoenix New Times* stating that certain Motel 6 properties in Phoenix were regularly providing guest lists to agents of the United States Immigration and Customs Enforcement ("ICE"). Ex. 1, VanBeest Decl. at ¶¶ 7-8. Upon publication of the story, Defendants launched an investigation into the alleged practice and determined that Motel 6 likely provided guest lists to Federal Immigration Authorities on a recurring basis at eight properties operated by Defendants—two in Arizona and six in Washington state. *Id.* at ¶¶ 9-11. One Franchised Location in Washington State also may have disclosed guest lists to Federal Immigration Authorities on occasion.[2] *Id.* at ¶ 20.

B. Procedural Background

On January, 24, 2018, Plaintiffs filed the complaint in this action alleging that Defendants employed a corporate policy to provide Guest Information on demand to Federal Immigration Authorities. ECF No. 1. Plaintiffs challenge Defendants' alleged policy as discriminatory, unconstitutional, and violative of state laws protecting consumers. On May 8, 2018, Defendants filed an answer and defenses to the class action complaint, denying any wrongdoing or violation of the law. ECF No. 23. On June 5, 2019, Plaintiffs filed, with Defendants' consent, an Amended Class Action Complaint for

[2] On April 4, 2019, Defendants and the State of Washington jointly submitted a request for a Consent Decree in Washington state court, resolving an action brought by the State of Washington. *See State of Washington v. Motel 6 Operating L.P. and G6 Hospitality LLC*, No. 18-2-00283-4 SEA, Superior Court of the State of Washington, King County. A copy of the Consent Decree is attached hereto as Exhibit 2.

Declaratory Injunctive Relief (the "Amended Complaint"). ECF No. 54.

The Agreement is the product of vigorous, adversarial negotiations. The Parties began negotiations in earnest on or about March 8, 2018, when the Parties met to discuss their views of the case. Ex. 3, Holguin-Flores Decl. at ¶ 6. On June 15, 2018, the Parties engaged in a day-long mediation with Martin F. Scheinman, Esq., an independent and respected neutral, which resulted in a tentative settlement. Agreement, attached as Ex. A to [Proposed] Order, § IV.C. After filing a motion for preliminary approval of their original proposed settlement agreement on November 2, 2018, the Parties had a hearing with the Court in which the Court requested additional information about the settlement. ECF No. 39. After a telephonic hearing with the Court on March 27, 2019, the Parties engaged in an additional mediation on April 3, 2019. Agreement § IV.G. As a result of that mediation and the Parties' continued negotiations, the Parties reached the Agreement.

C. Reasons for Settlement

Plaintiffs' counsel believe they could make a strong showing of why they should succeed on the merits of their claims. Based on diligent effort, Plaintiffs' counsel has been aware of the attendant strengths, risks, and uncertainties of their case during the course of this litigation and settlement negotiations. Ex. 3, Holguin-Flores Decl. ¶ 8. Defendants, on the other hand, vigorously deny any wrongdoing or liability and contend that they could be wholly successful in defeating Plaintiffs' claims at or before trial. Defendants deny that they had or employed a policy and/or practice that was discriminatory, unconstitutional or violative of any state laws. Agreement § XIV.A.

While both sides robustly contest the issues, the Parties appreciate the costs and uncertainty attendant to any litigation and have agreed to the proposed Agreement. *Id.* Plaintiffs' counsel entered into the Agreement after considering, among other things: (i) the substantial benefits to Class Members under the terms of the Agreement; (ii) the uncertainty and expense of being able to prevail through trial and on appeal; (iii) the attendant risks, difficulties, and delays inherent in complex actions such as this; and (iv) the desirability of consummating this Agreement promptly to provide substantive

relief to Class Members without unnecessary delay and expense. Ex. 3, Holguin-Flores Decl. ¶ 8.

III. SUMMARY OF THE SETTLEMENT

A. Summary of Changes from the November 2, 2018 Agreement

The Agreement includes several significant changes from the Parties' previous agreement filed with the Court on November 2, 2018.

First, it expands the scope of the classes to covers guests who stayed at Motel 6 Franchised Locations (not just locations owned and operated by Defendants), and it extends the class period by two years. *See* Agreement §§ VII.A.-B.

Second, it revises the class definitions and consolidates the three classes into two. The Primary Class consists of Registered Guests whose information was disclosed. Class 2 consists of persons who were not Registered Guests but who experienced an encounter with Federal Immigration Authorities as a result of the disclosure of a Registered Guest's information – such as friends and family members of the Registered Guest. In either Class, persons who were questioned, interrogated, detained, and/or placed in immigration removal proceedings as a result of the disclosure of Guest Information to Federal Immigration Authorities will be eligible to receive tiered damages. Primary Class Members also will be eligible to receive a payment for the disclosure of their Guest Information. *See id*. The minimum award has been increased to $75, and the maximum award has been increased to $200,000. *See id.* § XII.C.1. The Agreement also provides the criteria for determining the size of the Class Member awards. *See id.* It provides a consolidated cap on damages awards of $10,000,000.00 (the "Settlement Amount"). *See id.* § XII.B.1.

Fourth, it accounts for the Washington Settlement by providing that, should the value of valid claims determined by the Claims Administrator for either class exceed the total amount allocated to that class under the Agreement, anyone compensated under the Washington Settlement will have any award to which they are entitled under the Agreement reduced by the amount they received from Washington. *See id.* § XII.C.2.

Fifth, it increases the amount to be paid to Class Counsel from $300,000 to $500,000 to reflect the additional work involved in negotiations, documentation, and appearances subsequent to filing the November 2, 2018 agreement. *See id.* § XIII.A.

Sixth, it provides that, if the full Settlement Amount is not paid to Class Members, unclaimed amounts will be paid in alternating $500,000 portions to Defendants and a *cy pres* fund, until a total of $1,500,000 has reverted to Defendants; any remaining amounts will be paid to the *cy pres* fund. *See id.* § XII.B.3.

Finally, it includes technical amendments to (a) clarify the injunctive relief class requested by the Parties; (b) reflect that opt-out and objection notices must be filed with the Court; (c) expand the means of public notice to be provided; (d) incorporate revisions to the text of California Civil Code § 1542 that have taken effect since the November 2, 2018 agreement was executed; and (e) clarify and address how unclaimed funds are to be distributed. *See id.* §§ VIII.C; X.A; IX.C; XII.B.

B. Summary of the Equitable Relief Provisions

1. Definition of the Equitable Class

For purposes of equitable relief under Federal Rule of Civil Procedure 23(b)(2), the class represented by Plaintiffs is all persons who stayed at any Motel 6 Location in the United States between February 1, 2015, and June 28, 2019, and whose Guest Information was provided to Federal Immigration Authorities. *See id.* § VII.B.

2. Injunctive Relief

Defendants agree to injunctive relief obligating them to institute, implement, and maintain the following Policy. First, Defendants must establish a 24-Hour Hotline to assist employees of Motel 6 Entities when the employees receive any request for Guest Information from Federal Immigration Authorities. *Id.* § X.A.1.a. Second, Defendants must not share Guest Information with Federal Immigration Authorities unless Federal Immigration Authorities provide a judicially enforceable warrant or subpoena, or there is a credible reason to believe that a guest, employee or other individual is in imminent danger, meaning that there is a particularized concern related to the safety and well-being of an

individual currently on the property. *Id.* §§ X.A.1.b.i-iii. Third, Defendants must establish a brand standard prohibiting Franchised Properties from providing Guest Information to Federal Immigration Authorities, except in the same circumstances described above. *Id.* § X.A.1.b.iv. Fourth, with respect to all other warrants or subpoenas presented by Federal Immigration Authorities, Defendants shall not share Guest Information until such warrants or subpoenas have been sent to the Defendants' legal department or other individuals who will have been trained to comply with the Policy, and until such persons have authorized the disclosure. *Id.* § X.A.1.b.ii. Fifth, Defendants must create an online mechanism for Guests to submit a report when they believe that the Policy has been violated in any manner. *Id.* § X.A.1.b.v.

Defendants also will train employees at Operated Locations who have the ability to make Guest Information available to understand their responsibilities with regard to the Policy, and the resources available to them when they need guidance. *Id.* § X.A.1.c.

The Agreement provides that this equitable relief will be entered as a three-year consent decree, providing the Court jurisdiction to enter all orders necessary to implement the relief provided. *Id.* §§ VI.A.-B.

3. Dispute Resolution and Enforcement Procedures

The Parties have agreed that Martin F. Scheinman, Esq., is to be appointed as Settlement Administrator with authority to resolve all disputes arising under the Agreement. *Id.* § X.B.1. The Parties have also agreed to extensive dispute resolution procedures. *See generally id.* § X.B.

4. Costs of Notice

Defendants agree to pay the costs of notice to class members and claims administration, not to exceed $1,000,000.00. *Id.* § XII.D. The designated Claims Administrator, ACS, will conduct class notice and claims administration in consultation with the Parties, and will invoice Defendants directly for its fees and costs. *Id.* § XII.D.1. Defendants also agree to pay the costs associated with retaining CDM, who will assist in locating, providing notice to, and otherwise facilitating interactions with claimants now

residing in Mexico and Central America. *Id*. § XII.D.2. The CDM costs are not subject to the $1,000,000 cap for ACS. *Id*.

C. Summary of the Monetary Relief Provisions

1. Definition of the Classes and the Corresponding Settlement Amounts

For purposes of monetary damages under Federal Rule of Civil Procedure 23(b)(3), the classes represented by Plaintiffs and the monetary damages they will be provided are as follows:

- A **Primary Class**, consisting of all claimants who were Registered Guests at a Motel 6 Location in the United States during the Class Period, and whose Guest Information was provided to Federal Immigration Authorities by a Motel 6 Location in the United States, each of whom shall be a "Primary Class Member," except those who file a timely request to opt-out of the monetary damages provisions.
- **Class 2**, consisting of all Guests who were not Registered Guests, and were questioned, interrogated, detained, and/or placed in immigration removal proceedings by Federal Immigration Authorities as a result of a Motel 6 Location's disclosure of Guest Information to Federal Immigration Authorities, each of whom shall be a "Class 2 Member," except those who file a timely request to opt-out of the monetary damages provisions.
- Excluded from the Settlement Class are the Motel 6 Entities and all federal governmental entities and personnel, including Federal Immigration Authorities.

Agreement §§ VII.A; XII.A. The Claims Administrator will evaluate Class Member claims. The Agreement specifies the criteria to be used by the Claims Administrator in determining the amount of any award, subject to a cap on any individual award of $200,000. *See id.* § XII.C.1.

2. Distribution of Unclaimed Funds

Unclaimed funds from the Settlement Amount, if any, will be returned as follows. The first $500,000 of any unclaimed funds will revert to Defendants; the next $500,000

will be paid to a *cy pres* fund; the next $500,000 will revert to Defendants; the next $500,000 will be paid to a *cy pres* fund; the next $500,000 will revert to Defendants; and any remaining amounts will be paid to the *cy pres* fund. *Id*. § XII.B.3. Any *cy pres* funds are to be distributed to a non-profit organization or organizations approved by the Court. *Id.* § XII.B.4. The proposed organizations and the proposed proportionate distributions are set forth in the Agreement. *Id.*

IV. THE COURT SHOULD CONDITIONALLY CERTIFY THE CLASS

The "threshold task is to ascertain whether the proposed settlement class satisfies the requirements of Rule 23(a) of the Federal Rules of Civil Procedure applicable to all class actions, namely: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998). In consumer class actions, doubts on certifying a class should be resolved in favor of certification. *See City P'ship Co. v. Jones Intercable, Inc*., 213 F.R.D. 576, 581 (D. Colo. 2002).

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under [Rule 23(b)]." *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997). Where a party seeks both equitable and monetary relief, a Court must undergo a Rule 23(b)(2) and Rule 23(b)(3) analysis. *See Jefferson v. Ingersoll Int'l. Inc.*, 195 F.3d 894, 898-99 (7th Cir. 1999) (holding that court may certify injunctive aspects of action under Fed. R. Civ. P. 23(b)(2) and damage aspects under Fed. R. Civ. P. 23(b)(3) "where monetary relief is incidental to the equitable remedy"); *see also* 5 Moore's Fed. Pract. § 23.43 ("[A] court may certify injunctive aspects of the litigation under Rule 23(b)(2) and damages aspects under Rule 23(b)(3). That approach allows consistent treatment of class-wide equitable relief and also provides an opportunity for class members to opt out of the damages claims.").

If those requirements are met, as they are here, then under the December 2018 amendments to Rule 23, the Court directs notice to class members who would be bound by the Parties' settlement proposal if it finds that approval of the settlement and certification

of the class are shown to be likely. Fed. R. Civ. P. 23(e)(1)(B).

A. The Proposed Classes Satisfy Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." Generally, classes of forty or more are sufficiently numerous. *Harris v. Palm Springs Alpine Estates*, 329 F.2d 909 (9th Cir. 1964). Defendants' records indicate that there are over 52,000 Registered Guests (at eight Motel 6 Locations) whose Guest Information may have been provided to Federal Immigration Authorities and who thus could qualify as members of the Primary Class. Ex. 1, VanBeest Decl. ¶ 21. This more than satisfies the requirements of Rule 23.

With respect to Class 2, Federal Immigration Authorities have not shared any information with the Parties as to how many persons they questioned or otherwise interacted with as a result of the disclosure of Guest Information, and thus the Parties cannot speak with certainty the size of Class 2. Given the enormous size of the Primary Class, however, the Parties reasonably expect that the number of persons who were not Registered Guests but who nonetheless experienced interrogation or some other interaction with Federal Immigration Authorities is certain to meet the numerosity requirement.

Indeed, Class Counsel already has been in contact with 41Class Members; 16 of those were not Registered Guests and appear to be members of Class 2. Of the Plaintiffs here, six were Registered Guests and thus are members of the Primary Class; two were family members of Registered Guests and thus are members of Class 2. Ex. 3, Holguin-Flores Decl. ¶ 24. Moreover, even without full disclosure by Federal Immigration Authorities, the Parties are aware that dozens of people were arrested – to say nothing of those who were merely questioned – in just a portion of the Class Period and at just a handful of Motel 6 Locations. The *Phoenix New Times* identified 20 immigration arrests during the period between February and August 2017 at the Arizona Motel 6 properties in

question. Ex. 1, VanBeest Decl. ¶ 8.[3] Defendants know of at least eight persons from Washington who underwent an encounter with Federal Immigration Authorities. *Id*. at ¶ 19. Thus, the Parties are confident that, given the size of the Primary Class, the expanded Class Period, and the national scope of the class, Class 2 will easily meet the numerosity criterion once notice is given.

2. Commonality

Rule 23(a)(2) requires "questions of law or fact common to the class." "All questions of fact and law need not be common," however: "Where the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012); *see also In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 117-18 (C.D. Cal. 2007). "In the Ninth Circuit, the Rule 23(a)(2) requirements are construed 'permissively.'" *Quintero v. Mulberry Thai Silks, Inc*., No. C 08-02294 MHP, 2008 WL 4666395, at *3 (N.D. Cal. Oct. 22, 2008) (quoting *Hanlon*, 150 F.3d at 1019). "[C]ommonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 154 (C.D. Cal. 2015) (internal citation omitted). Where such a policy exists, "individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality." *Id.*; *accord Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014).

Here, all Primary Class members are individuals whose Guest Information was provided to Federal Immigration Authorities. As to them, this lawsuit challenges the alleged policy of sharing their Guest Information with Federal Immigration Authorities on

[3] By expanding the class scope, the Parties have increased the size of the Primary Class— from a class of over 27,000 members to a class of over 52,000 members. Exhibit 1, VanBeest Decl. ¶¶ 21-22. The parties expect a proportional increase in Class 2, as well. Thus, the Parties reasonably expect the Class 2 claimants to be substantially more numerous than the numbers here today, especially once notice is given.

demand, it seeks a change in policy to prevent such occurrences in the future, and it seeks compensation for the damage suffered. It therefore meets the commonality requirements. As to Class 2, the lawsuit challenges the same alleged policy, but by claimants who suffered indirect, but still proximate, harm as a result of it. *See generally* ECF No. 23 at 1-2. Class Members therefore share a common injury and set of legal issues. *See id.*

3. Typicality

Rule 23(a)(3) sets a "permissive standard"; named plaintiffs' claims are typical if they are "reasonably co-extensive with those of absent class members." *Hanlon*, 150 F.3d at 1020. Representative plaintiffs must also be members of the classes they seek to represent. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982). Here, the proposed Class Representatives have claims typical of the Settlement Class. As set forth in the attached Primary Class Declarations, six Plaintiffs are members of the Primary Class – they were Registered Guests whose Guest Information was disclosed. *See* Primary Class Declarations, attached as Exhibits 4-9. The remaining two Plaintiffs (Jane F. and Jane N.) are members of Class 2 – they were not themselves Registered Guests so their personal information was not disclosed, but they were staying with family members who were Registered Guests and whose information was disclosed. As a result, the Class 2 Representatives were subjected to immigration action. *See* Class 2 Declarations, attached as Exhibits 10-11.

4. Adequacy of Representation

Rule 23(a)(4) requires that Class Representatives "fairly and adequately protect the interests of the class." This requires resolving two issues: (1) whether the Class Representative has interests in conflict with the proposed Class; and (2) the qualifications and competency of proposed class counsel. *In re Live Concert Antitrust Litig.*, 247 F.R.D. at 118. Regarding qualifications of counsel, the Court should analyze "(i) the work counsel has done in identifying or investigating potential claims[;]… (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims

asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Plaintiffs do not have interests that conflict with the proposed Settlement Classes. The Primary Class Representatives allege that they, like all Primary Class Members, contracted for hospitality services and had their Guest Information disclosed to Federal Immigration Authorities. The Class 2 Representatives allege that they, like all Class 2 Members, were questioned, interrogated, detained, and/or placed in immigration removal proceedings as a result of Guest Information being provided to Federal Immigration Authorities. Compl. ¶¶ 46-58, 65; *see also* Ex. 3, Holguin-Flores Decl. ¶ 23. Nothing in their experience presents any conflict with their fellow Class Members.

Further, Plaintiffs actively engaged with counsel in every phase of the filing and settlement of this case. Plaintiffs' declarations in support of this motion and their continued participation in this litigation and settlement demonstrate that they are adequate class representatives. Despite Federal Immigration Authorities having removed two of the Plaintiffs, those Plaintiffs submit declarations in support of this settlement and will continue to adequately represent the interests of the Class.

Additionally, Plaintiffs' counsel is amply qualified, as is evidenced by their thorough investigation, detailed Amended Complaint, and extensive work in negotiating the proposed Settlement. Ex. 3, Holguin-Flores Decl. ¶¶ 6-12. Plaintiffs' counsel has numerous years' experience and demonstrated success in bringing class action claims. *Id.* at ¶¶ 14-22. They will more than adequately protect Class Members' interests. *Id.*

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

Certification under Rule 23(b)(2) is appropriate where defendants have acted on "grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Courts in this Circuit have recognized that it can be appropriate to separately certify injunctive relief and monetary damages classes that are largely coextensive. *See, e.g., In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 977 (C.D. Cal. 2015) ("[T]he Ninth Circuit has suggested on

multiple occasions that district courts consider certifying separate Rule 23(b)(2) and 23(b)(3) classes. . . . Consequently, . . . it appears that the court can separately certify an injunctive relief class and, if appropriate, also certify a Rule 23(b)(3) damages class.").

Here, all Injunctive Class members are individuals whose Guest Information was provided to Federal Immigration Authorities. *Supra* Part III.B. The proposed injunctive relief prohibits Defendants from providing Guest Information to Federal Immigration Authorities except under specified, lawful circumstances, and establishes additional policies and procedures to ensure compliance with that proposed rule, as well as a mechanism for receiving and processing guest complaints for any perceived violation of it. *Supra* Part III.C. The Injunctive Class is distinct from any class receiving a monetary award, so there is no need to address whether any monetary relief is "incidental" to the equitable relief for purposes of Rule 23(b)(2). The Court, therefore, should conditionally certify the Injunctive Class under Rule 23(b)(2) for settlement purposes.

C. The Monetary Relief Classes Meet the Requirements of Rule 23(b)(3)

Certification under Rule 23(b)(3) requires that: (A) questions of law or fact common to the class predominate over questions affecting only individual members; and (B) a class action is superior to resolution by other available means. Fed. R. Civ. P. 23(b)(3); *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1062 (C.D. Cal. 2010).

The predominance test is satisfied when common questions "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022 (quoting 7A Charles Alan Wright, et al. *Federal Practice & Procedure* § 1778 (2d ed. 1986)). "[T]he presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Levya v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013); *see also Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010) ("The potential existence of individualized damage assessments. . . does not detract from the action's suitability for class certification."); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment.").

Here, common issues predominate over individual issues with respect to both the Primary Class and Class 2. With respect to the Primary Class, each member suffered the same alleged wrong: the disclosure of his or her personal information. Though the Class Members may have suffered varying degrees of harm as a result of the disclosure, the common issues still predominate: the fact of disclosure; whether such disclosure was wrongful; whether it was discriminatory and otherwise meets the elements of the claims pled; and whether it caused injury.

As to Class 2, all of the same commonalities are present; the only difference is that the Class 2 Members are not claiming harm from disclosure of their own information, but rather that the alleged policy which permitted disclosure of someone else's information adversely affected the Class 2 Member while he or she was at a Motel 6 Location. As a result, each was required to establish his or her authorized presence in the United States.

By certifying these classes, the Court avoids the need for separate adjudication of the fact of each disclosure and the determination as to lawfulness of each such disclosure. Moreover, the causation element – *e.g.*, whether the unlawful disclosure led to the encounter with Federal Immigration Authorities – is likely to be the same in the vast majority of cases because in most cases, if not all, the encounter with Federal Immigration Authorities began while the claimant was present at a Motel 6 Location.[4] As in *True*, "[a]lthough individual damages . . . would vary, common issues of fact predominate over individualized inquiries." 749 F. Supp. 2d at 1066. Further, damages can be measured with a common methodology that is directly connected to the alleged wrong, as described in the Agreement. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34–38 (2013).

Class treatment also is the superior means to adjudicate Plaintiffs' claims. When analyzing superiority, a court considers: "(1) the interest of members of the class in

[4] It is conceivable that, in a few cases, Federal Immigration Authorities might have had some independent basis for its encounter with a claimant other than the disclosure of Guest Information, and might have interrogated or otherwise interacted with the claimant even without such disclosure, but such cases are expected to be few and not an adequate basis for denying certification.

individually controlling the prosecution … of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by … members of the class; and (3) the desirability … of concentrating the litigation … in the particular forum."[5] *True*, 749 F. Supp. 2d at 1062.

There currently are no other, duplicative class action cases here. The only known litigation that presented similar issues was the Washington Action, but as discussed above, that matter involved claims asserted by the State Attorney General—not individuals or a class of plaintiffs. It sought relief only as to activities that occurred in Washington. It was settled in April, 2019, with statements by Washington that it would distribute some of the settlement funds to its affected residents. To the extent that the Settlement Class here would overlap with persons who received some relief in that matter, the Parties have agreed, as set forth in the Agreement, to provide for a setoff of funds received from the Washington Action against any amounts due here. Thus, nothing in this proposed settlement would interfere in any way with the resolution bargained for in the Washington Action.

Moreover, resolution of the claims as a national class will avoid the need for the different state Attorneys General to bring separate actions to protect their constituents and demand a change in Motel 6 policies and practices with respect to the disclosure of Guest Information. Instead, the Agreement ensures, through the use of a federal consent decree with national scope, that Motel 6 will have a Policy adequate to protect Guest privacy while also meeting the appropriate demands of law enforcement. Moreover, any constituents who suffered any harm from improper disclosures of Guest Information will have the right and opportunity to be compensated through this action.

Resolving all claims for these proposed national classes in one proceeding also will preserve efficiency for the Court, the Parties, and other courts. It is neither economically feasible, nor judicially efficient, for thousands of potential Class Members to file small

[5] A fourth factor—the difficulties of managing the class action—is not considered when certification is requested only for purposes of settlement. *Id.* at n.12.

claims against Defendants on an individual basis, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338–39 (1980), and continued litigation without class certification could potentially "dwarf potential recovery." *Hanlon*, 150 F.3d at 1023. This is particularly true for the Primary Class, whose size could well exceed 50,000 persons.

Indeed, as a result of the Agreement, all those who endured interrogation and other action by Federal Immigration Authorities will avoid having to bring claims against Defendants and prove damages in separate proceedings. Instead, those would-be individual plaintiffs will be able to submit a Claim Form to the Claims Administrator, who will base an award on the information submitted and the tiered formula set forth in the Agreement (and herein), avoiding the need for proof as to liability and damages under the usual rules of evidence and incorporated burdens. Any issues or disputes as to the support required or amount of the award will be resolved by the Settlement Administrator, avoiding further involvement by the Court and the burdens, costs and time that would be involved if a judicial proceeding were necessary.

The Parties are mindful that the Court previously noted that the circumstances under which claimants were put into removal proceedings may vary widely, and questioned whether that affects the commonality requirement. The Parties respectfully submit that, although the Court's observation is correct—there may be numerous reasons why the United States decided to commence removal proceedings as to any individual—that is not a significant issue in this litigation (nor would it be if claims were pursued individually). This litigation does not address the reasons the United States chose to pursue certain individuals in immigration proceedings, the outcome in those proceedings, or whether either was justified. The United States may choose not to initiate proceedings against some people it may be entitled to do so, as it has done under the DACA initiative and other excises of deferred action, and it may initiate proceedings against those who are ultimately entitled to remain in the United States, as in the case of some individuals who are entitled to asylum or other relief. Whatever the merits of the United States' actions with respect to individual class members, the issue in this litigation is whether Motel 6's actions

contributed to class members' requirement to establish their lawful presence in the United States, regardless of justification or outcome.

Here, the means for addressing any differences among Class Members is through the claims administration process. Indeed, the Agreement and its specified criteria for calculating damages point to the commonalities among Class Members, as the criteria set forth a formula by which they will be compensated. *See* Agreement § XII.C. All who were forced to defend their presence in the country, whether rightly or wrongly, and incurred legal expenses or other costs related to such immigration proceedings will be awarded the actual amount of the expenses incurred and documented, not to exceed $200,000. *Id.* While the precise burdens and costs varied, these variations are easily categorized and subordinated to the larger commonality of the Settlement Class and the common wrong. By contrast, the most significant differences in circumstances among individuals who potentially face removal proceedings—the result of the adjudication of their immigration status, with all its attendant effects—are in no way attributable to Defendants' conduct and this settlement does not provide for any compensation related to those effects.

V. THE CRITERIA FOR PRELIMINARY APPROVAL OF THE SETTLEMENT ARE SATISFIED

It is well-settled that the law strongly "favors settlements… where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). Preliminary approval of a class settlement "is committed to the sound discretion of the trial judge," but courts should give "proper deference to the private consensual decision of the parties," because "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties . . . must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud[,] … overreaching[,] … or collusion," and is fair, reasonable, and adequate. *Hanlon*, 150 F.3d at 1026-27; *see also Knight v. Red Door Salons, Inc*., No. 08-1520 SC, 2009 WL 248367,

at *4 (N.D. Cal. Feb. 2, 2009) ("The recommendations of Plaintiff's counsel should be given a presumption of reasonableness." (citation and quotations omitted)).

Under Rule 23(e), the Court must find that it "will likely be able to approve the [Parties'] proposal under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(1)(B)(i). Under that rule, the Court must consider whether

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

All of the above factors are amply satisfied here.

A. Adequate Representation

As set forth in Section IV.A.4, *supra*, the Class Representatives and Class Counsel adequately represent the Settlement Class. Rule 23(a)(4) requires that Class Representatives "fairly and adequately protect the interests of the class." This requires resolving two issues: (1) whether the Class Representatives have interests in conflict with the proposed Class; and (2) the qualifications and competency of proposed class counsel. *Resnick v. Frank*, 779 F.3d 934, 943 (9th Cir. 2015); *Stanton v. Boeing Co.*, 327 F.3d 938, 957-58 (9th Cir. 2003); *In re Live Concert Antitrust Litig.*, 247 F.R.D. at 118. For all of the reasons discussed in Section IV.A. 3 and 4, *supra*, both the Class Representatives and Class Counsel adequately represent the Settlement Class.

B. Arm's Length Negotiations and Settlement

If the terms of a settlement are fair, courts generally assume the negotiations were proper. *See In re GM Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785-86 (3d Cir. 1995). As set forth in Section V.D below, there can be no question that the terms are fair. The Parties' negotiations were vigorous and contested, with the Parties

represented by experienced counsel. The Parties engaged in a series of informal, arm's length discussions over a period of months before enlisting the services of an independent, professional mediator. Ex. 3, Holguin-Flores Decl. ¶¶ 6-7. A full-day mediation resulted in the original tentative settlement, and the complaint and agreement were substantially revised after a second full-day mediation. Agreement §§ IV.C, G. These lengthy negotiations before a third-party demonstrate that the Settlement was anything but collusive. *See, e.g., Adams v. Inter-Con Sec. Sys., Inc.*, No. C-06-5428 MHP, 2007 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007) ("The assistance of an experienced mediator … confirms that the settlement is non-collusive.").

C. Adequacy of Relief

The Court must also determine whether the proposed settlement is "fundamentally fair, adequate, and reasonable." *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Rule 23(e)(2)(c) sets forth factors a court must consider when determining whether it is likely to find that the relief in a proposed agreement is adequate. Fed. R. Civ. P. 23(e)(2)(c)(i)-(iii).[6] All of the factors are satisfied here.

1. The Costs, Risks, and Delay of Trial and Appeal

In considering the first factor, "the Court cannot and need not determine the merits of the contested … issues at this stage, and to the extent courts assess this factor, it is to determine whether the decision to settle is a good value for a relatively weak case or a sell-out of an extraordinary strong case." *Misra v. Decision One Mortg. Co.*, No. SA CV 07-0994 DOC (RCx), 2009 WL 4581276, at *7 (C.D. Cal. Apr. 13, 2009) (internal citation and quotations omitted). "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific Enters. Secs. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Thus, "the

[6]A fourth factor is any agreement made in connection with the proposal. Fed. R. Civ. P. 23(e)(2)(C)(iv). There is no agreement between the Parties not included in the materials filed with this motion, aside from what was included in the materials filed on November 2, 2018, which have been superseded by the materials filed today. *See* Agreement § XIV.F.

Court should not without good cause substitute its judgment for [counsel's]." *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979).

Here, "[i]n addition to being familiar with the present dispute, Plaintiff[s'] counsel has considerable expertise in . . . class action litigation." *Knight*, 2009 WL 248367, at *4; *see also* Ex. 3, Holguin-Flores Decl. ¶¶ 14-22. Both MALDEF and the Ortega Law Firm have litigated numerous federal class actions, including before this Court, *e.g.*, *Valenzuela v. Ducey*, No. CV-16-03072-PHX-DGC, 2018 WL 3069464 (D. Ariz. June 21, 2018). Likewise, Defendants are represented by experienced lawyers and law firms with similar depth and experience, and corporate counsel who participated actively in settlement discussions. The Parties agreed to the proposed Agreement after vigorous negotiations on the terms and with the benefit of an experienced mediator. *Supra* Part V.B. Simply stated, there is nothing to counter the presumption that counsel's recommendation is reasonable.

Moreover, the benefits of the relief obtained are obvious. First and foremost, the Agreement provides Plaintiffs and Class Members with the significant benefits of the injunctive relief, which will protect them from future disclosure of Guest Information, except in specific, lawful circumstances. Such injunctive relief provides significant value, as it will prevent the alleged practices that Plaintiffs claim harmed consumers from reoccurring. *See Riker v. Gibbons*, No. 3:08-cv-00115-LRH-VPC, 2010 WL 4366012, at *4 (D. Nev. Oct. 28, 2010) (approving settlement for injunctive relief that "achieve[d] the goals of the lawsuit").

Second, the Agreement provides generous monetary relief for Class Members. Primary Class Members who had *no* direct interaction with Federal Immigration Authorities during their stay at Motel 6 will receive $75 (which equals or exceeds the nightly cost of many Motel 6 rooms). Agreement § XII.C.1. All other Class Members may receive as much as $200,000 from the Settlement Amount, depending on a specific tiered formula in the Agreement that the Claims Administrator has agreed to apply. *Id.* These amounts were determined after research into the typical costs associated with immigration proceedings. Ex. 3, Holguin-Flores Decl. ¶ 10. If a larger than expected

number of claims are received, the amount of any award will be reduced proportionally until the total paid does not exceed the respective class Settlement amount.

The amount of monetary recovery is particularly generous in light of the significant risk of dismissal of some or all claims and an adverse judgment on class certification, as well as the near certainty of appeal at both the class certification stage and any final judgment. While Plaintiffs are confident in the strength of their claims, and investigated them fully, they recognize that Defendants have factual and legal defenses that, if successful, could defeat or substantially impair the value of their claims. *See, e.g.*, ECF No. 23. As a result, they negotiated with ample knowledge of the strengths and weaknesses of their case. Ex. 3, Holguin-Flores Decl. ¶ 8. "The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery…." *In re Nvidia Derivs. Litig.*, No. C-06-06110-SBA (JCS), 2008 WL 5382544, at *3 (N.D. Cal. Dec. 22, 2008).

In addition, continuing to litigate this action would require extensive resources and time, including expert testimony and *Daubert* motions. A trial involving the claims of potentially thousands of potential class members who stayed at numerous, geographically dispersed locations would require the presentation of dozens of witnesses at a minimum. Appeals could follow. In contrast, the proposed Agreement will yield a certain, substantial, and prompt recovery for the class. "Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement…." *Nat'l Rural Telecomms. Coop. v. DirecTV*, 221 F.R.D. 523, 527 (C.D. Cal. 2004); *see* Fed. R. Civ. P. 23(e)(2)(C)(i).

2. Effectiveness of Distribution of Relief

a. The Claims Administration Team

With respect to the second factor in Rule 23(e)(2), the Parties can distribute relief effectively. They have agreed to retain ACS as Claims Administrator. Agreement § XIII.B. As set forth in the attached Declaration of Angela Ferrante, ACS is a boutique class action settlement administration company with years of experience in third-party

claims administration, mail-house operations and call center support management. Ex. 12, Ferrante Decl. ¶ 2. Ms. Ferrante, who will oversee this matter, personally has overseen some of the largest and most high-profile administrations in history and has been responsible for many class action settlement administrations. *Id.* at ¶ 6. At the Parties' request, ACS already has invested significant time preparing for the administration of this matter, including preparation of a user-friendly online claims filing portal, preparation of FAQ's for its call center, and initial training of its call center employees. *Id.* at ¶ 9.

The Parties also have agreed to retain CDM for additional assistance in locating and providing notice to potential Class Members now residing in Mexico or Central America. *Id.* at ¶ 17. CDM provides litigation support and settlement administration support to government agencies, non-profit organizations and private law firms whose clients or witnesses have returned to Mexico and Central America. CDM has supported numerous class settlements, including in this Circuit. *See Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013) (assisting class counsel with distribution of $2.8 million in settlement funds to more than 1,000 H-2A agricultural workers from Mexico who suffered pervasive wage theft in the United States); *Teoba v. TruGreen Landcare, L.L.C.*, No. 6:10-cv-06132 (W.D.N.Y. Mar. 15, 2010) (provided litigation support in class action on behalf of H-2B employees for violations of state and federal minimum wage laws stemming from the company's failure to reimburse visa and travel expenses, and led extensive outreach efforts in Mexico and the United States to distribute settlement notices and claim forms to hundreds of class members).

The Parties also agree to retain Martin F. Scheinman, Esq. as Settlement Administrator. *See* Agreement § X.B.1. Mr. Scheinman is neutral in this case, having served as the mediator who was mutually selected by the Parties to settle this dispute. *Id.* His background knowledge of the case and his familiarity with the claims administration process will create efficiencies for the Parties in resolving any further issues and disputes in connection with the claims administration process. Indeed, his experience has already

assisted the Parties in their additional negotiations subsequent to the January 29, 2019 hearing.[7] *See* Agreement § IV.G.

Finally, MALDEF has particular experience with class actions in which class members are no longer in the United States after being deported, and it has leveraged that experience in designing the notice procedures here. *See Ortega Melendres, et al. v. Maricopa Cnty., et al.*, No. cv-07-2513-PHX-GMS (D. Ariz.) (co-counsel in continuing proceedings to enforce court order requiring reforms to Maricopa County Sheriff's Office to address racial profiling and unlawful traffic stops of Latinos). Further, MALDEF and the Ortega Law Firm have extensive ties to the Class community and the information networks in this community, including members of the Mexican Consulate. *See* Ex. 3, Holguin-Flores Decl. ¶ 24.

b. The Mechanics of Giving Notice

The Parties have had extensive discussion regarding the mechanics of providing the best practical notice to the Settlement Class. As a result, the Agreement requires written notice by mail, as well as notice via various social media and electronic outlets.

With respect to the Primary Class, Defendants have collected recent, if not current, mailing addresses for those persons. To do so, they have identified the properties and dates during which guest lists were provided to Federal Immigration Authorities, and then relied on their database to generate registered guest lists for the affected properties and time periods. Ex. 1, VanBeest Decl. ¶ 11, 21-22. Because identification must be provided at check in, and because the registration information for such persons is still stored in their

[7] To the extent there is any concern that Mr. Scheinman, who is a founder of ACS, might have a conflict of interest in his role as Settlement Administrator, Ms. Ferrante has sworn there will be no opportunity for a conflict. Exhibit 12, Ferrante Decl. ¶¶ 10-11. He has no financial conflict; the budget for the claims administration process is capped by the settlement agreement and does not turn on the amount paid to class members or the number of claims approved or denied. *See* Agreement § XII.D. Nor does Mr. Scheinman have any role in the day to day operation of ACS and its cases. *Id.* ACS' claims administration work is run by others, and Mr. Scheinman he will not be involved in that process. *Id.*

registration database, *id.*, Defendants were able to assemble a list of names and addresses of those whose information likely was provided to Federal Immigration Authorities – the putative members of the Primary Class. *Id.* To account for any changes in address, those names and addresses will be cross-referenced against the National Change of Address database to update or complete the information in Defendants' records. *See* Agreement § XII.F.1.a. This process will ensure that the vast majority of the Class —and certainly all that can be identified through reasonable effort, Fed. R. Civ. P. 23(c)(2)(B)—receive individual notice in the mail. All notices will be available in English and Spanish to ensure that the affected populations will be able to understand their rights and what they must do to receive a payment of benefits.

The Parties also expect that members of the Primary Class (Registered Guests) will share notice with members of Class 2 - the friends and family members who were sharing a room with a Registered Guest and, as a result, faced some immigration action.[8] Thus, the Parties expect that the majority of Class 2 Members will be notified. To capture those in the Class 2 whose information was not on a guest list, however, the Parties intend to use the following additional notice methods.

First, MALDEF and CDM both will provide notice on their Facebook pages and Twitter accounts, and expect this notice to be forwarded and retweeted by their followers to reach a broader audience of those in the immigrant community. *See* Agreement § XII.F.2. Second, this notice will be supplemented by targeted internet search advertisements and a targeted social media campaign. *Id.* Because of the widespread availability of internet services on individual cellular telephones in the United States and Mexico, this notice via social media is expected to be effective in reaching any individuals

[8] Because the Parties are able to determine through Defendants' records only which Registered Guests' names were given to Federal Immigration Authorities, but not what Federal Immigration Authorities subsequently did with that information, the Parties cannot identify all members of Class 2 at this time, and will require class members to provide information in their claim forms to verify their membership in those classes. As discussed above, however, Plaintiffs have been in contact with at least 16 persons who appear to meet the criteria for Class 2. *See* Section IV.A.1, *supra*.

who, for whatever reason, do not receive the individually mailed notice or learn of it through news reporting of this case. In the experience of MALDEF, CDM, and the Claims Administrator, social media is highly effective at providing notice to geographically dispersed, mobile populations, particularly the communities likely to comprise Class Members in this case. Ex. 3, Holguin-Flores Decl. ¶ 14; Ex. 12, Ferrante Decl. ¶¶ 14, 18.

c. Distribution of Awards

Once located, there is little concern that it will be difficult to distribute the proceeds to Class Members. All claimants will be asked to provide their address and other contact information on a claim form. Distributions of the award will be made to the addresses provided in the claim form. Claim forms can be received and submitted online, or received by calling the Claims Administrator to request one and submitting it by mail. Thus, just as there are multiple overlapping means of receiving notice, there also are multiple technologies and means available to receive and submit a claim form.

The monetary awards will be distributed to Class Members who make claims determined to be valid by the Claims Administrator based on criteria identified *supra* Part III.B. The Claims Administrator shall request additional information where claim forms are not complete, and claimants shall be able to appeal a denial of their claim to the Claims Administrator. *See* Agreement § XII.J, O. Awards will be distributed by mail to the address submitted on the claim form. *Id*. § XII.Q. These procedures ensure that funds will be broadly distributed among Class Members. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii).

d. The Parties' Plan for Disposition of Undistributed Funds is Appropriate

i. *Cy Pres* Distribution

The Agreement contains a limited *cy pres* provision whose terms have been altered by the Parties since they last appeared before the Court. At the time of the Order, the Court expressed its concern that, because a case addressing *cy pres* awards in class actions was pending before the United States Supreme Court, its outcome could affect the *cy pres* component of any agreement in this case. Since that time, that particular concern has been

mooted by the Supreme Court's decision, which declined to reach the merits of the case and remanded for lower courts to address whether the plaintiffs had standing to sue. *See Frank v. Gaos*, 586 U.S. ___, 139 S.Ct. 1041 (2019).

Even if the Supreme Court had reached the merits in that case, however, its decision likely would not have affected the settlement here, as the *cy pres* award addressed in *Frank* is nothing like the one at issue here. In *Frank*, the parties proposed to apportion $3.2 million of an $8.5 million settlement fund for attorneys' fees and $5.3 million to a group of *cy pres* recipients, with none allocated to direct monetary relief for class members. *See In re Google Referrer Header Privacy Litig*, 869 F.3d 737, 740, 747 (9th Cir. 2017). Those circumstances raised significant and understandable concerns: although the procedural mechanism of class actions is designed to enable individual plaintiffs with small claims to seek redress collectively, *cy pres*-only settlements would not provide *any* individual award to the victims, and divide a significant portion of the award to Class Counsel. These were the concerns that led the Supreme Court to grant a writ of certiorari. *See Frank*, 139 S.Ct. 1045 (per curiam) (Slip. Op. at 4) (noting objectors' concern was that "settlements providing **only** *cy pres* relief do not comply with the Requirements of 23(e)") (emphasis added); *id*. at 1047 (Thomas, J., dissenting) (Slip. Op. at 2-3 (declining to address the role of *cy pres* in disposing of unclaimed or undistributable class funds but concluding a "*cy pres*-**only** arrangement" that does not "obtain[] any relief for the class" including "no meaningful injunctive relief" violates Rule 23(e)) (emphasis added).

No such concerns exist here. In the instant case, every Class Member who submits a valid claim form will receive a cash award of at least $75 and as much as $200,000. Class Members also will benefit from the injunctive relief contained in the Agreement. Class Counsel has not sought to enrich itself at the expense of the Class: it seeks only $500,000, which is separate from the potential $10 million allocated to class members.

In addition, the limited *cy pres* payment would be made only if, after all making all valid payments to Class Members, there remains more than $500,000 left in the Settlement

Amount.[9] This type of *cy pres* award routinely has been upheld by numerous courts. *See, e.g.*, *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) ("We join other courts of appeals in holding that a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury."); *see also* 4 Newberg on Class Actions § 12:32 (5th ed.) ("Courts in every circuit, and appellate courts in most, have approved the use of *cy pres* for unclaimed class action awards.")

Common sense also supports approving the *cy pres* remainder element as a practical matter in the unique circumstances of this case. As noted above, the Parties have a limited ability to project the number of claimants who faced immigration action, and thus they are not certain whether claimants will utilize the full Settlement Amount of $10,000,000. Here, Defendants, as a gesture of their good faith and commitment to the changes brought about by this litigation, have agreed that, should less than $9.5 million of the money be claimed, some amount may be paid to the *cy pres* recipients, rather than being returned to Defendants. Moreover, by agreeing to a large cap on individual recovery, the Parties are trying to protect valid claimants should their number be substantially higher than the dozens already known to Class Counsel and/or should they have valid losses near the high end of the damages range.

Finally, the *cy pres* recipients here "bear[] a direct and substantial nexus to the interests of absent class members," *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012), by addressing "the objectives of the underlying statutes" and "the interest of the silent class members, including their geographic diversity." *Nachshin v. AOL, LLC*, 664 F.3d 1034, 1039 (9th Cir. 2011). The Parties have agreed to propose the following four organizations as recipients of the capped *cy pres* amounts: 1) The Florence Immigrant & Refugee Rights Project; 2) The Northwest Immigrant Rights Project; 3) The National

[9] There is no *cy pres* component to the Primary Class Settlement Amount; any unpaid funds will simply be returned to Defendants.

Immigrant Justice Center; and 4) TheDream.US. If any *cy pres* distribution is to be made, each of the first two listed organizations would receive 35%, and each of the latter two would receive 15%. Ex. 3, Holguin-Flores Decl. ¶¶ 9-10.

The first three of the *cy pres* recipients provide direct services to those who are forced to defend their presence in the United States. Ex. 3, Holguin-Flores Decl. ¶ 23. And as proposed by the Parties, the majority of the *cy pres* funds would be provided to organizations based in the areas where the Federal Immigration Authorities' contacts occurred—Arizona and Washington. Because Class Members reside throughout the United States, however, the Parties have designated a smaller portion to be provided to a nationwide direct services organization that assists the same population.[10] *Id.* Additionally, the Parties nominate The Dream.US as a *cy pres* recipient because of its long-standing advocacy and support for non-citizens and for providing scholarships to non-citizen students pursing higher education, which will aid children Class Members, such as Jane F's children.

ii. Reversion

In this case, if there are any funds unclaimed, at least some of those amounts will be returned to Defendants. Agreement §§ XII.B.3. Like *cy pres* distributions, reversion is permitted in the Ninth Circuit. *See, e.g., Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) ("[R]eversion to the defendant may be appropriate when deterrence is not a goal of the statute or is not required by the circumstances."); *cf. Klier v. Elf Atochem North Am. Inc.*, 658 F.3d 468, 482 (5th Cir. 2011) (Jones, C.J. concurring) ("In the ordinary case, to the extent that something must be done with unclaimed funds, the superior approach is to return leftover settlement funds to

[10] The Parties stipulate that the exact allocation and designation of *cy pres* recipients is not material to the Settlement, and if the Court ultimately rejects the allocation among *cy pres* recipients or rejects any particular *cy pres* recipients proposed by the Parties, but otherwise accepts the settlement, the remaining *cy pres* recipients proposed by the Parties will receive a *pro rata* share of the rejected *cy pres* recipient and the Parties will not appeal or dissolve the Agreement on this ground.

the defendant.").

If the number of claimants is relatively small, and given the apparent consensus that *cy pres* awards are most appropriate when limited, *see, e.g., In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015), the Parties submit it would be inappropriate to have all of the unclaimed funds go to the *cy pres* recipients. By the same token, however, because the reversion is not complete, any deterrence element required by the underlying statutes is more than satisfied by the *cy pres* component of the settlement, which alternates payment of any unclaimed funds between Defendants and the *cy pres* fund. *Cf. In re MyFord Touch Consumer Litig.*, No. 13-CV-03072-EMC, 2019 WL 1411510, at *5 (N.D. Cal. Mar. 28, 2019) ("The guaranteed minimum payment provision mitigates the most problematic feature of a claims-made settlement—the reversion of unclaimed funds to the defendant.").

3. The Terms of the Attorneys' Fees Award

The proposed attorneys' fees award are a powerful indicator of the fairness of the instant settlement. Court approval of class action settlements is predicated on the concern that defendants and class counsel may collude for their own respective benefit at the expense of the class. *See Stanton*, 327 F.3d at 957-58. This concern is not present in this case. Here, if this settlement is approved, Plaintiffs' counsel will be entitled to $500,000—about 5% of the total settlement amount (not including fees and costs that Defendants have agreed to bear) - and will not be paid until the Settlement has been finally approved, with no possibility of further appeal. Agreement § XIII.A. This is an eminently reasonable request, far lower than the 25% of recovery benchmark used in this Circuit for class action attorneys' fees awards. *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015) ("Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in this circuit, the benchmark percentage is 25%."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (upholding fee award of 28% of settlement and noting "The district court based its percentage award on [case stating] that "[i]n common fund cases, the 'benchmark' award is 25 percent of the

recovery obtained," with 20–30% as the usual range. Ninth Circuit cases echo this approach.") (citation omitted); *In re AT & T Corp.*, 455 F.3d 160, 172 (3d Cir. 2006) (upholding 21.25% fees award and referencing objectors' citations to study finding average fee awards in the range of 15%-18% of settlement fund). It also is in line with the hourly amount that Plaintiffs' Counsel would have billed at this stage if it were charging its clients at a reasonable hourly rate. Ex. 3, Holguin-Flores Decl. ¶ 25.

Further, this is not a case where Defendants sought to minimize the amount of their payment in settlement. Despite real issues with the viability of Plaintiffs' claims and real questions whether Plaintiffs could obtain class certification (including those identified by the Court at the January 29, 2019 hearing), Defendants have agreed to enter into a consent decree and to make a multimillion-dollar payment to resolve this litigation. Further, Defendants have sought to include terms to make sure that most, if not all, of the allocated funds for settlement are distributed to actual valid claimants, but as a measure of their good faith, have agreed that, if fewer claimants than they expect appear and demand to be compensated, some limited amount of money will be paid to respected charitable organizations that protect the interests of those similarly situated to class members.

E. Equitable Treatment of Class Members

The final factor under Rule 23(e)(2) asks the Court to assess whether the Agreement provides relief on an equal basis to all Class Members. Here, it does. All members of the Settlement Class are entitled to be compensated for their harm, and the expected variation in awards will be based on specific, objective criteria. *See* Agreement § XII.C.1. Thus, all members will be treated the same way, even if the amounts they receive are different. Importantly, all members of each class are entitled to the same relief as the Class Representatives who are also within their class; the Agreement does not give preferential treatment to the Class Representatives.

The Agreement also provides that any Class Member compensated under the Washington Agreement will not have any amount received from Washington deducted from any award received under the Agreement unless the value of awards determined by

the Claims Administrator exceeds the Settlement Amount. Agreement § XII.C.2. In that case, any compensation received by any claimant who already received funds from the Washington Settlement will be deducted from the amount that Class member receives under the Agreement. *Id.* This provision ensures that class members in Washington state do not receive a windfall from double recovery that class members situated elsewhere do not, but it also protects the private right of action that class members in Washington state have, and their right to ensure that they receive fair compensation for their injuries.

VI. THE COURT SHOULD APPOINT THE CLASS REPRESENTATIVES AND CLASS COUNSEL.

For all of the reasons set forth herein and in the Parties' previously submitted Motion for Approval of Settlement Agreement (ECF No. 33), the Parties request that the Court appoint counsel for the Plaintiffs as Class Counsel pursuant to Rule 23(g) because they meet all of the criteria stated in Rule 23(g)(1) and (4), and appoint the Named Plaintiffs as Class Representatives pursuant to Rule 23(a). To be clear, the Parties request that the following persons be named as Primary Class Representatives: Jane V., John A., John E., John D., John M. and John W; and the following persons be named as Class 2 Representatives: Jane F. and Jane N.

VII. THE COURT SHOULD APPROVE THE NOTICE PLAN

If the Court's *prima facie* review of the relief offered and notice provided by the Agreement are fair and adequate, it should order that notice be sent to the Class. *Manual for Complex Litig., Fourth*, § 21.632 at 321. Notice of a class action settlement must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and … be heard." *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (internal quotations and citation omitted).

The proposed notice plan constitutes the best notice practicable. *See* Agreement § XII.F. As contemplated in the Order, the Parties have revised their proposed notices. The revised notices, which supersede the notices attached to the Parties' November 2, 2018 filing, are attached as Exhibits B-D of the revised Proposed Order. The notices are neutral, and written in easy-to-understand clear language in both English and Spanish The mailed notice and website notice each state: (i) the nature of the action; (ii) the class definitions; (iii) the claims, issues, and defenses; (iv) that a class member may enter an appearance through an attorney if he or she wishes; (v) that the Court will exclude any Class Member who so requests; (vi) the time and manner of requesting exclusion; and (vii) the binding effect of a class judgment. Proposed Order Ex. B, Ex. D. The revised notices thus satisfy the requirements of Rule 23(c). *See generally* Fed. R. Civ. P. 23(c)(2)(B)(i-vii).

As discussed above, the notice plan involves direct mailings to the individuals identified by Defendants' records as potential Class Members, as well as by social media and other electronic forms. Agreement § XII.F; Proposed Order Ex. C. Notice will be provided in English and Spanish. Further information will be available on a website established by the Claims Administrator.

Settlement Class members will have 60 days from mailing to opt out or object and an additional 15 days after submitting opt-out requests to rescind those requests. *See* Agreement at § XII.F, I. This is sufficient time to give Class Members the opportunity to comment on and take part in the settlement. *Cf. Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (approving class notice sent thirty-one days before objections deadline and forty-five days before final approval hearing).

The notices to be posted on social media will contain an image of the complete mailed notice as part of the posting, and thus will satisfy the requirements of Rule 23 in the same manner as the mailed notice. *See* Ex. C; *cf.* Ex. B.

As explained more fully in *supra* Part V.D.2, the Parties believe that the proposed notice plan is the best practical. The Parties have the means to contact the vast majority of Class Members directly based on Defendants' records of their stay in Motel 6. For those

who were not Registered Guests, they are likely to be notified because of their affiliation with Registered Guests in the Class and by the broad public notice outreach. Because of the broad geographic distribution of the proposed Class and high cost of traditional print or broadcast media, the Parties believe that use of such traditional media would be impracticable and have little likelihood of providing additional value in notifying the class. However, because of public interest in this case, it is likely that coverage of the Agreement in the news media will provide an additional means by which class members can learn of the settlement.

The Parties propose the following timeline:

Event	Date
Preliminary Approval Granted	Day 1
Class Settlement Website Activated Parties Provide Lists of Potential Class Members to Claims Administrators	Day 20
Notice is Posted to Facebook and Twitter	Day 30
Notice is Mailed	Day 60
Last Day to Postmark Opt Out or Objection	30 days before Final Approval Hearing [Preferably Day 120]
Parties to File Motion for Final Approval	21 days before Final Approval Hearing [Preferably Day 129]
Last Day to Submit a Claim and to Rescind Opt Out	As set by the Court [Preferably Day 135]
Parties to File Brief Replying to Objections Objectors File Notice of Intent to Appear	7 days before Final Approval Hearing [Preferably Day 143]
Final Approval Hearing	As set by the Court [preferably Day 150]
Completion of All Review of Claims and Appeals by Claims Administrator	Last Day to Submit a Claim +171 [Preferably Day 306]

Accordingly, the Parties request the Court schedule the Final Approval Hearing 150 days after the order granting preliminary approval, or as soon thereafter as practical.

VIII. CONCLUSION

For the foregoing reasons, the Parties respectfully request the Court grant the relief requested herein. A revised Proposed Order is attached.

DATED this 28th day of June, 2019.

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2019, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants in this matter.

DATED: June 28, 2019

/s/ Andres Holguin-Flores
Andres Holguin-Flores
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND