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16 SUPERIOR COURT OF CALIFORNIA
17 COUNTY OF LOS ANGELES
18

19 ASHLEY NOVAK,

20 Plaintiff,

21 vs.

22 PACIFIC BIOSCIENCE LABORATORIES,
23 INC. AND PACIFIC BIOSCIENCE
LABORATORIES, PRODUCTS, INC., and
24 DOES 1-50

25 Defendants.
26
27
28

CASE NO. BC582188

Hon. Ann I. Jones, Dept. 11

Class Action

**NOTICE OF MOTION AND MOTION
FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

**[Filed with Joint Declaration of Class
Counsel]**

Date: May 17, 2019

Time: 10:00 a.m.

Dept: 11

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TO EACH PARTY AND TO THE COUNSEL OF RECORD FOR EACH PARTY:

YOU ARE HEREBY NOTIFIED THAT on May 17, 2019, at 10:00 a.m., in Department 11 of this Court located at 312 N. Spring Street, Los Angeles, California 90012, Plaintiff Ashley Novak will move the Court for an order granting final approval of the class action settlement preliminarily approved of by this Court on December 10, 2018. This Motion is made on the ground that all parties have satisfied the requirements for final approval of the Settlement and the Settlement is otherwise fair, reasonable, and adequate, as set forth in the accompanying Memorandum of Points and Authorities. The Motion will be based upon this Notice, the attached Memorandum of Points and Authorities in support thereof, the Joint Declaration of Class Counsel, and the records and files in this action.

Dated: April 15, 2019

JOSEPH J. M. LANGE LAW CORPORATION

By:



JOSEPH J.M. LANGE
Attorney for Plaintiff
Ashley Novak

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Ashley Novak (“Plaintiff” or “Ms. Novak”) submits this Memorandum in support of
4 her motion for final approval of the Stipulation and Settlement Agreement (“Settlement
5 Agreement”)¹ between Plaintiff, on behalf of herself and all others similarly situated, and
6 Defendants Pacific Bioscience Laboratories, Inc., and Pacific Bioscience Laboratories Products, Inc.
7 (collectively “Defendants”), in the action entitled *Ashley Novak v. Pacific Bioscience Laboratories,*
8 *Inc., and Pacific Bioscience Laboratories Products, Inc.*, Los Angeles County Superior Court of the
9 State of California, Case No. BC582188 (the “Action”). On December 10, 2018, the Court granted
10 preliminary approval of the Settlement.

11 Following extensive, good-faith, and arm’s-length negotiations between experienced counsel
12 representing both sides, the parties have agreed to settlement terms that they believe will fairly
13 resolve this Action, avoid protracted, expensive and uncertain litigation, and reasonably and
14 adequately provide prompt, effective, and certain relief for putative class members. Class Counsel
15 believes that the settlement confers substantial benefits to the Settlement Class, while avoiding the
16 risks and delays inherent in litigating this case through class certification, through trial, and any
17 appeals.

18 An objective evaluation of the Settlement confirms that the relief negotiated on the
19 Settlement Class’s behalf is fair, reasonable, and valuable. The Settlement – negotiated at arm’s-
20 length by the Parties – provides Settlement Class Members with relief comparable to that which they
21 might have hoped to win at trial.

22 The Settlement provides consumers with the benefits of their bargains with Defendants.
23 Settlement Class Members will receive an extension and enhancement of their original warranties to
24 cover Battery Failure - the inability of a Brush to achieve power due to the battery cells’ depleted
25 capacity to accept or hold a charge. This warranty extension will guarantee Settlement Class
26 members the right to exchange malfunctioning units for the properly working Clarisonic Skin
27

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¹ Unless otherwise stated, all capitalized terms shall have the same meanings as set forth in the Settlement Agreement.

1 Brushes (the “Brushes”) they bargained for, without cost and while avoiding the normal warranty
2 claim process, and which will therefore remedy the problems alleged in the Complaint. This
3 warranty extension provides consumers with a one-year warranty extension if their Brush was sold
4 with a one-year warranty, a nine-month extension if their Brush was sold with a two-year warranty,
5 or a six-month extension if their Brush was sold with a three-year warranty – but never less than six
6 months from the Effective Date of the Settlement. Additionally, the Defendants’ warranty
7 obligations would be enhanced beyond the obligations undertaken in the written warranty, as under
8 the Settlement, they must additionally provide Settlement Class Members with a dedicated toll-free
9 telephone number so that Settlement Class Members will receive a telephonic assessment of their
10 Brushes by specially trained agents familiar with these issues, and to arrange for return shipping at
11 Defendants’ cost. Finally, once a covered Battery Failure is diagnosed, the Settlement provides that
12 Defendants must, at their option, repair or replace the Brush.

13 The Settlement leaves no doubts as to the ability of Settlement Class Members, wherever
14 situated in the United States, to enforce the obligations of the Settlement in this Court in the unlikely
15 case of any dispute. Defendants have undertaken to submit to the Jurisdiction of this Court for all
16 Settlement related disputes and Class Counsel have undertaken to continue representing their
17 interests to resolve those disputes or submit them for determination by this Court.

18 The proposed relief is arguably superior to the relief that the Settlement Class might have
19 obtained after a successful trial for two important reasons. First, a successful trial might entitle
20 Settlement Class Members only to monetary damages in the amount of the diminished value of the
21 Brushes, while the Settlement provides the properly working Brushes they bargained for. Second, by
22 settling now rather than proceeding to trial, Settlement Class Members will not have to wait
23 (possibly years) for relief, nor will they have to bear the significant risks of establishing liability,
24 certifying a class, and of Defendants prevailing at trial or on appeal.

25 As discussed below, the Court’s instructions have been successfully carried out. Accordingly,
26 Plaintiff respectfully requests that this Court grant final approval of the Class Action Settlement.

II. FACTS AND PROCEDURE

A. Background of the Case

Plaintiff alleges that Defendants design, manufacture, and market the Brushes, which are devices designed as cosmetic aids to clean and exfoliate the user's skin through the use of an oscillating brush. Though they differ somewhat in cosmetic appearance or in certain features, the Brushes share a common design utilizing an integral Nickel Metal Hydride (NiMH) battery contained in their handles, which are recharged with an external AC charger.

After an extensive factual investigation involving expert testing and analysis of the technical issues responsible for the alleged battery failures in the Brushes, on May 18, 2015, Plaintiff commenced this Action alleging that the design of the battery in the Brushes contains a characteristic defect, which leads to premature Battery Failure, which Defendants failed to disclose. The Plaintiff's class action Complaint seeks relief for the Plaintiff and the Class based upon alleged (i) violations of the Unfair Business Practices Act §§ 17200, *et seq.*; (ii) violation of the Consumer Legal Remedies Act §§ 1750, *et seq.*; and (iii) breach of implied warranty pursuant to Song-Beverly Consumer Warranty Act §§ 1792 and 1791, *et seq.* Moreover, the Complaint alleges that Defendants were unwilling or unable to repair the alleged defect in violation of federal and state warranty laws. Defendants have at all times denied the legal claims of Plaintiff and the Class, as well as the factual predicates for them.

B. The Parties Engaged in Extensive and Arm's-Length Settlement Negotiations

The Parties began to discuss the possibility of settlement in earnest in the second half of 2016 with a meeting of all counsel in San Diego to exchange ideas. The parties later agreed to attend a mediation session with respected Mediator Jeffrey Krivis in November 2016. Mr. Krivis was successful in bridging the gaps between the parties' respective positions in the litigation, and general agreement of the framework upon which this matter could be resolved was reached. During the next several months, the Parties engaged in multiple telephone conferences during which they discussed remaining details of the Settlement. The entire negotiating process was at times difficult, involving research and consultation with respective clients and experts, but ultimately productive. The Parties agreed upon a detailed term sheet and further agreed to move forward with drafting of the Settlement

1 Agreement, as well as the related notice documents, for which approval is now sought. Thereafter,
2 only *after* the material terms of the Settlement were agreed to, the Parties negotiated, and reached, an
3 agreement on attorney fees. (See Joint Declaration of Joseph J. M. Lange, Robert I. Lax, and David
4 E. Azar In Support Of Motion for Final Approval and Unopposed Motion for an Award of
5 Attorneys' Fees, Costs, and Plaintiff's Incentive Award ["Joint Decl."], ¶ 4.)

6 **C. The Proposed Settlement Fully Resolves Plaintiff's Asserted Claims**

7 **1. Composition of the Settlement Class**

8 The Settlement Class consists of all end-user Persons in the United States who purchased or
9 received as a gift authentic Clarisonic sonic skin cleansing devices consisting of the Mia 1, Mia 2,
10 Mia 3/Aria, Pro, and Plus models purchased in the period from January 1, 2009, to December 31,
11 2016.²

12 **2. Terms of the Proposed Settlement**

13 The Settlement provides immediate relief to the Settlement Class, and provides them with the
14 full benefits of their bargains with Defendants, by furnishing them with working Brushes lasting for
15 the full length of their expected useful lives. The following is a general summary of the principal
16 terms provided in the Settlement Agreement. As discussed below, the Settlement provides an
17 extension and enhancement of the manufacturer's warranty to cover Battery Failure for the
18 following periods:

- 19 • For any Brush sold with an original manufacturer's warranty of 12 months, the
20 warranty will be extended as to Battery Failure for 12 months from the date on which
21 the warranty did or will expire.

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26 ² Excluded from the Settlement Class shall be (i) any person or entity who has released claims relating to or arising out of
27 purchase, receipt, or use of the Brushes; (ii) any person or entity who has purchased or acquired Brushes for resale; (iii)
28 Defendants and any parent, subsidiary, affiliate, officer, director, or current or former employee; and (iv) any judicial
officer to whom the Action is assigned, as well as the judicial officer's immediate family members. (Settlement
Agreement, ¶ I(23).)

- For any Brush sold with an original manufacturer's warranty of two years, the warranty will be extended as to Battery Failure for nine months from the date on which the warranty did or will expire.
- For any Brush sold with an original manufacturer's warranty of three years, the warranty will be extended as to Battery Failure for six months from the date on which the warranty did or will expire.
- In order to ensure that every Settlement Class Member has an opportunity to receive the benefits of this Settlement, each class member will be entitled to a warranty extension for battery failure for an underlying minimum of six months following the Effective Date.

(Settlement Agreement, ¶ II(B)(1).) During the extended warranty period, the Settlement requires Defendants to repair or replace Brushes diagnosed with Battery Failure experienced and submitted during the warranty extension period. Defendants will require possession of an authentic Brush and either a receipt or a statement by the Settlement Class Member made under penalty of perjury stating the date that he or she purchased the Brush during the class period, which statement shall also specify the retailer, if known, from which he or she purchased the Brush. The Administration process agreed to by the Parties is not burdensome and requires little effort on claimants' part, particularly due to the toll-free number and Defendants bearing the cost of return shipping the old unit, as well as any replacement or repaired device due under the Settlement. The fact that a sworn statement is accepted in lieu of a receipt makes it possible for all Settlement Class Members to participate, even if their record keeping is imperfect. (*Id.*, ¶ II(B)(2).)

The Settlement not only extends the warranties, but also enhances the manufacturer's warranty. The Settlement requires the Defendants to maintain a toll-free telephone number for class members to obtain telephone diagnoses for Battery Failure, and to arrange for warranty fulfillment and free shipping, as well as to train telephone agents so that they are knowledgeable enough to handle such calls under this settlement. (*Id.*, ¶ II(B)(2).)

The Settlement also provides for Defendants' payment of approved Plaintiff's attorney fees and expenses for Class Counsel not to exceed \$750,000, and an approved incentive award of up to

1 \$1,000 to proposed class representative Ms. Novak (*id.*, ¶ V(A)), and will bear the expenses
2 associated with the extensive multi-media Class Notice program and payment of the costs of the
3 Settlement and Notice Administrators (*id.*, ¶ III).

4 In addition, the Settlement provides that the Defendants shall bear the costs of administering
5 the Settlement and providing extensive multi-media Notice to the Settlement Class Members. (*Id.*, ¶
6 III). These expenses include the costs of creating a customer list and printing, processing, and
7 mailing the Settlement Class Notice. (*Id.*, ¶ III(E)). More critically, these costs include the expense
8 of the extensive and wide-ranging internet Notice program previously approved by the Court.

9 Those consumers preferring not to participate in the Settlement, whether to pursue their own
10 claims – or for any other reason – were free to exclude themselves and “opt out” of the Settlement to
11 pursue their own case, but to date none have chosen to do so. (*Id.*, ¶ VI(B)).

12 **3. Specific Provisions Guaranteeing Settlement Class Members’ Ability to** 13 **Enforce the Settlement Obligations in this Court**

14 Moreover, the Settlement contains specific provisions which leave no doubt as to the ability
15 of any Settlement Class Member, wherever situated, to receive the full benefits of the Settlement and
16 to enforce those rights in this Court in the unlikely case of any dispute. By agreeing to the
17 Settlement, the Defendants have undertaken to irrevocably submit to the jurisdiction of this Court
18 “for the purpose of enforcing, implementing, and interpreting the Settlement Agreement.” Class
19 Counsel have made their own undertaking to “make themselves available to Settlement Class
20 Member inquiries regarding the performance of the obligations of the Settlement as well as
21 Defendants’ satisfaction of those obligations,” and “to undertake to advocate for the enforcement of
22 the obligations of the Settlement and work in good faith to resolve any potential disputes relating to
23 the Settlement with Defendants through their Counsel, and seek the intervention of the Court to
24 enforce the obligations of the Settlement if such disputes cannot be resolved.” (Settlement
25 Agreement, ¶ IX(N).)

26 **4. Release by the Settlement Class**

27 The Releases the Defendants will receive are narrowly tailored. The Releases will not result
28 in the dismissal or compromise of any other pending claims in any Court. (Settlement Agreement, ¶

1 I(19).) Moreover, the Releases explicitly exclude any and all claims for personal injury or property
2 damages (except to the Brush itself) and Settlement Class Members remain able to pursue them to
3 any extent such claims might exist. (*Id.*) Plaintiff and Settlement Class Members who do not opt out
4 will Release only those claims arising out of or related to, in whole or in part, the initiation,
5 prosecution, or settlement of the Action, including but not limited to (i) any of the alleged
6 inadequacies, misstatements, or issues associated with the Brushes, their performance, or the Battery
7 Failure; (ii) any act, omission, or other conduct alleged or referred to in the Action; and (iii) any act,
8 omission, or other conduct that could have been alleged, referred to, or asserted in the Action by any
9 Plaintiff or any Settlement Class Member “which arises out of the same transaction, occurrence, or
10 series of transactions or occurrences as the cause of action which the plaintiff alleges in his
11 complaint.” (California Code of Civil Procedure 426.10(c), definition of “Related cause of action”).
12 Settlement Class Members therefore remain free to pursue any other causes of action, including any
13 claims for personal injuries or damage to property other than the Brushes, to whatever extent they
14 may possibly exist. (Settlement Agreement, ¶ I(19).)

15 **D. The Court Preliminarily Approved this Settlement**

16 On December 10, 2018, the Court granted Plaintiff’s Motion for Preliminary Approval of
17 Class Action Settlement. Among other things, the Court approved the Notice Plan set forth in
18 Section III of the Settlement Agreement, and set (i) January 24, 2019 as the deadline for serving
19 notice upon Settlement Class Members, (ii) March 28, 2019 as the deadline for Settlement Class
20 Members to object or opt out, and (iii) April 15, 2019 as the deadline for Class Counsel to file a
21 Motion for Final Approval of Settlement and Motion for Attorney Fees. (12-10-2018 Order Granting
22 Preliminary Approval of Class Action Settlement [“Preliminary Approval Order”]). The Court also
23 determined that the Settlement falls within the “range of reasonableness that could ultimately be
24 granted final approval with the Court”, and warrants submission to the Settlement Class Members
25 for their consideration, and for settlement purposes only, that the requirements of Code of Civil
26 Procedure section 382 are satisfied for the Class Representative and the Settlement Class. (*Id.*)

1 **E. The Settlement Administrator Has Successfully Carried Out the Notice Plan As**
2 **Ordered by the Court**

3 California Rules of Court, Rule 3.766 follows Federal Rule of Civil Procedure 23, which
4 mandates the provision of individual notice only “to all members *who can be notified through*
5 *reasonable effort*,” (Fed. R. Civ. P. 23(c)(2) (*italics added*)), and entitles *all* other class members
6 only to “the best notice practicable under the circumstances,” *id.*; or, in the language of Rule 3.766(f)
7 of the California Rules of Court, “a means of notice reasonably calculated to apprise the class
8 members of the pendency of the action.” *Hypertouch, Inc. v. Super. Ct.*, 128 Cal. App. 4th 1527,
9 1540 (2005), *as modified on denial of reh’g* 2005 Cal. App. LEXIS 896 (June 6, 2005). The standard
10 is whether the notice has “a reasonable chance of reaching a substantial percentage of the class
11 members.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 251 (2001) (“*Wershba*”) (citing
12 *Cartt v. Superior Ct.*, 50 Cal. App. 3d 960, 974 (1975)). The purpose of a class notice in the context
13 of a settlement is to give class members sufficient information to decide whether they should accept
14 the benefits offered, opt out and pursue their own remedies, or object to the settlement. *Wershba*, 91
15 Cal. App. 4th at 252.

16 The Court’s Preliminary Approval Order found that the Notice Plan, as set forth in Section
17 III of the Settlement Agreement and subsequent addendum, including the form and content of the
18 notices, is “acceptable.” (Preliminary Approval Order, p. 11).

19 The Notice Company successfully carried out the extensive internet Notice Plan approved by
20 the Court, which was designed to reach 81% of the Settlement Class on average of 2.1 times for each
21 Class Member. (*See* Joseph M. Fisher Certification filed on March 1, 2019 [“Fisher Cert.”], ¶¶ 7 and
22 8.) This internet notice program was designed based upon research regarding the demographic
23 makeup of the Settlement Class (*id.*, ¶ 4) and was aimed at this “Targeted Class” and utilized state of
24 the art banner and display advertisements on various websites used by that demographic group, as
25 well as by conducting an awareness campaign on Facebook (*id.*, ¶¶ 4 and 5), a platform used by 74%
26 of women in the United States. The nature of this campaign makes it extremely simple to share the
27 settlement information with friends, family, and other acquaintances with a few key strokes,
28 extending the reach of this notice program even further, and leaves no doubt that it reached “a

1 substantial percentage of the class members.” *Wershba*, 91 Cal. App. 4th at 251. Indeed, ultimately,
2 the “Online Notice Plan actually delivered an estimated reach of 84% with an average frequency of
3 3.2 members of the Target Class”, thereby exceeding expectations (Fisher Cert., ¶ 8.)

4 The other aspects of the Notice were completed as directed in the Preliminary Approval
5 Order, by the Settlement Administrator, Tilghman & Co., P.C. (“Tilghman”), as well. Pursuant to the
6 Court’s Preliminary Approval Order, the notice website, www.skinbrushbatterysettlement.com, went
7 online on December 27, 2019. (See L. Stephens Tilghman Certification filed on February 13, 2019
8 (“Tilghman Cert.”), ¶ 5.) As directed by the Court, prior to January 24, 2019, Tilghman received a
9 list of names and physical and email addresses from Defendants for the purpose of direct
10 “Postcard/Email Notice.” (*Id.*, ¶ 6.) On January 24, 2019, Tilghman distributed class notice by email
11 and U.S. Mail to the last known addresses of 796,959 Settlement Class Members. (*Id.*) Thereafter, a
12 second attempt to deliver the Postcard/Email Notice was completed for all Postcard/Email Notices
13 returned as deliverable for which the Post Office provided a forwarding address. (*Id.*)

14 **F. The Overwhelmingly Positive Reaction of the Class Members to the Settlement**

15 The Settlement provided for procedural safeguards for Settlement Class Members including
16 sufficient notice and the right to object and/or opt out of the Settlement. Therefore, the Court should
17 also take note of the reaction of the Settlement Class to the Settlement. *Dunk v. Ford Motor Co.*, 48
18 Cal. App. 4th 1794, 1802 (1996) (“*Dunk*”). Not a single member of the Settlement Class has
19 objected to the Settlement, and the reaction of the Class has been gratifyingly positive.³

20 Numerous courts have held that the number of class members who object to a proposed
21 settlement is a factor the Court may consider in its settlement approval analysis. *See, e.g., See 7-*

22
23 ³For example, a member of the Settlement Class graciously wrote to thank Class Counsel David Azar for his work and
assistance in filing a claim:

24 At this stage of my life one of the many freedoms gained as I lose other things, is that I no longer feel compelled
25 to pay attention to many of the boxes of expression and behavior we are pressed to stay in during our
26 professional careers. I know you went out of your way to help me when you did not have to. In this era, or any
27 other, that would be meaningful to me, regardless of the outcome. To me it is a sign that another human has a
good heart and compassionate spirit. It is never a waste of time and effort to liberally exercise those two
blessings. This is just me encouraging you, by confirming what you no doubt already know. What it does for
one personally is priceless, and is in itself the reward.

God bless you and yours, goodbye.

28 Claudia Newell

1 *Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1153 (2000) (one
2 factor that “lead[s] to a presumption the settlement was fair” is that only “a small percentage of
3 objectors” came forward); *see also Morey v. Louis Vuitton N. Am., Inc.*, No. 11CV1517 WQH BLM,
4 2014 WL 109194, at *7 (S.D. Cal. Jan. 9, 2014) (citing *Shames v. Hertz Corp.*, No. 07–CV–2174–
5 MMA(WMC), 2012 WL 5392159 at *8 (S.D. Cal. Nov.5, 2012) (citing *Mandujano v. Basic*
6 *Vegetable Prods. Inc.*, 541 F.2d 832, 837 (9th Cir. 1976)). The absence of a large number of
7 objectors supports the fairness, reasonableness, and adequacy of the settlement. *Morey v. Louis*
8 *Vuitton*; *see also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp.2d 164, 175 (S.D.N.Y.
9 2000) (“If only a small number of objections are received, that fact can be viewed as indicative of the
10 adequacy of the settlement.”); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979)
11 (finding “persuasive” the fact that 84% of the class filed no opposition). Here, not a single member
12 of the Settlement Class has objected to the Settlement. Therefore, the Class has overwhelmingly
13 approved of it and the Court should grant final approval thereof. *See 7-Eleven*, 85 Cal. App. 4th at
14 1153.

15 In this case, as stated above, Class Notice was given postcard/email notice to 796,959
16 potential class members identified by Defendants. (Tilghman Cert., ¶ 6.) Notice was also given by
17 publication, a banner ad campaign on the internet, and on the settlement website. (Tilghman Cert., ¶
18 5; Fisher Cert., ¶ 5). There have been no objections and no requests for exclusion. (Joint Dec., ¶ 13)
19 The lack of objections and requests for exclusions, compared to the large number of Settlement
20 Class Members who received Notice, favors approval of the settlement. Accordingly, the Settlement
21 Class has overwhelmingly approved the Settlement and it should therefore be finally approved. *See*
22 *7-Eleven*, 85 Cal. App. 4th at 1153.

23 **III. LEGAL STANDARD AND PROCEDURES FOR FINAL APPROVAL OF CLASS** 24 **ACTION SETTLEMENT**

25 Court approval is required for the settlement of a class action. *See* Cal. Civ. Code § 1781(f);
26 Cal. Rule of Court, Rule 3.769. The Court has broad discretion in reviewing a proposed class
27 settlement for approval. *Wershba*, 91 Cal. App. 4th at 234-35. Approval of a class action settlement
28

1 may be reversed only upon a strong showing of clear abuse of discretion. *Id.*; see *Kullar v. Foot*
2 *Locker Retail, Inc.*, 168 Cal. App. 4th 116, 127-28 (2008) (“*Kullar*”).

3 In a class action, the trial court has “broad discretion” to determine “whether a settlement
4 was fair and reasonable, whether notice to the class was adequate, whether certification of the class
5 was proper.” *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1389 (2010), *as*
6 *modified* (July 27, 2010) (“*Cellphone Fee II*”) (citing *Wershba*, 91 Cal. App. 4th at 234–35).
7 Reasonableness and fairness are presumed where: (1) the settlement is reached through “arms-length
8 bargaining;” (2) investigation and discovery are “sufficient to allow counsel and the court to act
9 intelligently;” (3) counsel is “experienced in similar litigation;” and (4) the percentage of objectors
10 “is small.” *Dunk*, 48 Cal. App. 4th at 1802 (citing 1 HERBERT NEWBERG & ALBA CONTE,
11 NEWBERG ON CLASS ACTIONS (3d ed. 1992) § 11.41). The presumption of fairness is
12 consistent with California’s public policy goal of favoring settlements. *In re Microsoft I-V Cases*,
13 135 Cal. App. 4th 706, 723 n.14 (2006) (“Public policy generally favors the compromise of complex
14 class action litigation”); *7-Eleven*, 85 Cal. App. 4th at 1151 (noting that “voluntary conciliation and
15 settlement are the preferred means of dispute resolution ... [t]his is especially true in complex class
16 action litigation”).

17 In reviewing the fairness of a class action settlement, “[d]ue regard ... should be given to
18 what is otherwise a private consensual agreement between the parties. The inquiry must be limited to
19 the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
20 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
21 whole, is fair, reasonable and adequate to all concerned.” *Cellphone Fee II*, 186 Cal. App. 4th at
22 1389 (citing *7-Eleven*, 85 Cal. App. 4th at 1145 (quoting *Dunk*, 48 Cal. App. 4th at 1801)) (internal
23 quotations omitted).

24 **IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT**

25 **A. The Class Received Adequate Notice of the Class Action Settlement**

26 In this Action, the first two steps in the settlement approval process have been completed.
27 First, this Court granted preliminary approval of the Settlement on December 10, 2018. In doing so,
28 the Court determined that the Settlement was within the range of possible final approval and ordered

1 that notice regarding the Settlement terms and proposed scheduling of the formal final fairness
2 hearing should be distributed to the Class. (*See* Preliminary Approval Order; *see also Wershba*, 91
3 Cal. App. 4th at 234-35) Second, the Settlement Administrators disseminated the Class Notice and
4 Electronic Notice Plan to the class, in accordance with the Court’s Preliminary Approval Order. (*See*
5 Fisher and Tilghman Certifications.)

6 The respective Settlement Administrators completed their administration of the Notice Plan
7 and Electronic Notice Plan as set forth in Section III of the Settlement Agreement, and addendum
8 thereto, employing the best practicable means to disseminate notice of the Settlement terms and date
9 and time of the final approval hearing to all Settlement Class Members. The various forms of Notice,
10 which the Court previously approved, allow Settlement Class Members to understand the proposed
11 Settlement Agreement, and procedures for them to follow in filing written objections to it, and in
12 arranging to appear at the Final Approval Hearing and state any objections to the proposed
13 Settlement; the nature of the case and the basic contentions and denials of the Parties; the right of
14 Persons within the Settlement Class to exclude themselves before a specified date; the procedures for
15 Persons within the Settlement Class to follow in requesting exclusion; the binding effect of any
16 judgment, whether favorable or not, on Persons within the Settlement Class who do not request
17 exclusion; and the right of Persons within the Settlement Class who do not request exclusion to enter
18 an appearance through counsel at the Final Approval Hearing.

19 The Electronic Notice Plan - designed to reach no less than 81% of the Settlement Class at
20 least 2.1 times each using targeted banner and display ads as well as a Facebook awareness
21 campaign - was timely completed according to the Preliminary Order. This Electronic Notice
22 program, based upon substantial demographic research was clearly “a means of notice reasonably
23 calculated to apprise the class members of the pendency of the action.” *Hypertouch*, 128 Cal. App.
24 4th at 1540. It has reached a “substantial percentage of the class members.” *Wershba*, 91 Cal. App.
25 4th at 251; *see also Edwards v. Nat’l Milk Producers Federation*, No. 11-cv-4766-JSW, 2017 U.S.
26 Dist. Lexis 145217, *12-13 (N.D. Cal. June 26, 2017) (approving notice primarily through online
27 notice campaign and website); *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573 (N.D. Cal. 2015)
28 (approving notice of Class by email with link to administration website); *In Re: Shop-Vac Marketing*

1 *and Sales Practices Litig.*, No. 4:12-md-2380, 2016 WL 7178421 (M.D. Pa. Dec. 9, 2016)
2 (approving internet notice program reaching 72% of the class); *Heartland Payment Systems, Inc.*
3 *Customer Data Security Breach Litig.*, 851 F. Supp. 2d 1040, 1061 (S.D. Tex. 2012) (approving
4 settlement notice on basis of administrator’s estimate of 81.4% reach); *In Re Oil Spill by the Oil Rig*
5 *“Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179 (approving
6 settlement notice campaign with significant internet component).

7 The balance of the Notice Program approved by the Court was accomplished as well. Using
8 Settlement Class Member contact information provided by Defendants, as well as standard follow-
9 up address search and re-mailing methods, the Settlement Administrator provided postcard/email
10 notice to all known Settlement Class Members. (Tilghman Cert., ¶ 6; Rule of Court 3.769(f); *Phillips*
11 *Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (“best practicable” notice provides a
12 description of the litigation and explanation of the right to opt out or object); *Mullane v. Central*
13 *Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (best practicable notice is that which is
14 “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of
15 the action and afford them an opportunity to present their objections”). Ultimately, postcard/email
16 notice was sent to 796,959 Settlement Class Members. (Tilghman Cert., ¶ 6.) As directed by the
17 Preliminary Approval Order, further information regarding the Notice was distributed via the
18 Settlement Website, including a link to the Settlement Website URL from Defendants’ website and
19 the Settlement Website URL was also included in the Postcard/Email Notice. (Tilghman Cert., ¶¶ 5
20 and 6.) The Publication Notice was also included in the targeted online campaign. (Fisher Cert., ¶ 2.)

21 Therefore, the Court may proceed to determine the fairness, adequacy, and reasonableness of
22 the Settlement, and order its final approval, secure in the knowledge that all Settlement Class
23 Members have been given ample opportunity to participate fully in the share determination,
24 exclusion, and approval processes.

1 **B. The Settlement Terms Are Presumptively Fair, Reasonable, and Adequate Based**
2 **on the Process That Produced the Settlement as well as the Complete Absence of**
3 **Objections**

4 This Settlement is presumptively fair and should be approved. A court should presume a
5 class settlement is fair where “(1) the settlement is reached through arm’s-length bargaining; (2)
6 investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3)
7 counsel is experienced in similar litigation; and (4) the percentage of objectors is small.” *Dunk*, 48
8 Cal. App. 4th at 1802; *7-Eleven*, 85 Cal. App. 4th at 1146. All these factors are present here. As
9 described in the preliminary approval papers, the settlement negotiations were thorough and
10 occurred at arm’s-length. Prior to the Settlement, Class Counsel – experienced in this type of
11 litigation - engaged in significant fact investigation including communications with Settlement Class
12 Members, and researched the claims in controversy, the defenses and the developing body of law.
13 Following notice, there have been no objectors to, nor requests to opt out from, the Settlement. The
14 Settlement is thus presumptively fair.

15 **C. The Settlement Terms Provide Benefits to the Class That Are Demonstrably**
16 **Fair, Reasonable, and Adequate in Relation to the Potential Benefits and Risks**
17 **of Further Litigation**

18 The Court should grant final approval of the Settlement in this case, based on the following
19 factors which evidence the fairness, reasonableness, and adequacy of the Settlement: (i) the value of
20 the settlement; (ii) the risks inherent in continued litigation; (iii) the extent of discovery completed
21 and the stage of the proceedings when settlement was reached; (iv) the complexity, expense, and
22 likely duration of the litigation in the absence of settlement; (v) the experience and views of class
23 counsel; and (vi) the reaction of the class members. *See Wershba*, 91 Cal. App. 4th at 244-45; *Dunk*,
24 48 Cal. App. 4th at 1801.

25 **1. The Value of the Settlement Favors Final Approval**

26 As discussed in Section II.C.2, above, the Settlement provides significant benefits to the
27 Class that warrant final approval. Settlement Class Members will receive an extension and
28

1 enhancement of their original manufacturer’s warranty for the full range of problems complained of
2 in the operative Complaint, which will allow them to exchange Brushes suffering from a Battery
3 Defect with the properly functioning Brushes they bargained for, and guarantees their rights to
4 enforce those obligations in this Court. The Settlement also provides for Defendants to bear the
5 expenses of notification and administration of the settlement, as well the Class Counsel’s attorney
6 fees and reimbursement of litigation expenses in an amount not to exceed \$750,000.00, as well as an
7 incentive award of \$1,000.00 for the proposed Class Representative, Ms. Novak, for her efforts
8 undertaken in bringing this case on behalf of the Settlement Class.

9 The Preliminary Approval and Final Approval papers describe the litigation issues and the
10 potential value of the case in light of the risks going forward. Accordingly, the Court has the
11 information it needs in order to evaluate the sufficiency of the Settlement. *See Kullar*, 168 Cal. App.
12 4th at 129-30, 132 (trial court should have sufficient information about the potential value of the
13 case and litigation issues to independently review the reasonableness of the settlement).

14 **2. The Settlement Avoids the Risks Inherent in Continued Litigation**

15 Of the many factors courts consider in deciding whether to approve a class action settlement,
16 “[t]he most important factor is the strength of the case for plaintiffs on the merits, balanced against
17 the amount offered in settlement.” *Kullar*, 168 Cal. App. 4th at 130 (quotation and citation omitted);
18 *Clark v. American Residential Services LLC*, 175 Cal. App. 4th 785, 799 (2009); *Munoz v. BCI*
19 *Coca-Cola Bottling Co. of Los Angeles*, 186 Cal. App. 4th 399, 407-8 (2010). To properly analyze
20 this factor, the record should contain an analysis of how the “core legal issue[s]” were considered,
21 such that the trial court can “satisfy itself that the class settlement is within the ballpark of
22 reasonableness.” *Munoz*, 186 Cal. App. 4th at 410; *Kullar*, 168 Cal. App. 4th at 133. The analysis
23 should provide the trial court with “basic information about the nature and magnitude of the claims
24 in question and the basis for concluding that the consideration being paid for the release of those
25 claims represents a reasonable compromise.” *Kullar*, 168 Cal. App. 4th at 133.

26 The trial court must then delicately balance the strength, nature, and magnitude of the claims
27 against the consideration offered in settlement, bearing in mind that the proposed “settlement is not
28 to be judged against a hypothetical or speculative measure of what might have been achieved had

1 plaintiffs prevailed at trial,” as “the merits of the underlying class claims are not a basis for upsetting
2 the settlement of a class action.” *Wershba*, 91 Cal. App. 4th at 246 (citations omitted). Indeed, the
3 trial court’s analysis “must be limited to the extent necessary to reach a reasoned judgment that the
4 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating
5 parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”
6 *Dunk*, 48 Cal. App. 4th at 1801 (quoting *Officers of Justice v. Civil Serv. Com’n of City and County*
7 *of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)). At its core, the trial court’s determination is
8 “an amalgam of delicate balancing” and “rough justice.” *Id.*

9 Here, Plaintiff alleges that Defendants design, manufacture, market, and the Brushes -
10 devices designed as cosmetic aids to clean and exfoliate the user’s skin through the use of an
11 oscillating brush, which features an integral Nickel Metal Hydride (NiMH) battery contained in their
12 handles, which are recharged with an external AC charger. Plaintiff further alleges that the design of
13 the battery in the Brushes contains a characteristic defect, which leads to premature Battery Failure,
14 which Defendants failed to disclose.

15 Class Counsel obtained and analyzed sufficient information and evidence to fully appreciate
16 the strengths of Plaintiff’s claims and the risks, expense of litigation and likely duration of further
17 litigation. Among other things, Class Counsel determined through independent research and during
18 informal communications with Defendants’ counsel, the product models and potential number of
19 products involved, the nature of the battery failures, customer experiences, and the period during
20 which the Brushes were manufactured. In addition, during preliminary communications between the
21 Parties’ counsel, several hotly contested issues surfaced including the time period in which a
22 warranty claim can be made, the time limitations for suit on a latent defect such as that at issue, and
23 the risk of seeking class certification. Thus, Class Counsel understood the potential for certification
24 and a finding of liability for Plaintiff’s warranty and Song-Beverly claims were far from certain and
25 thus Defendants’ overall liability had to be discounted.

26 After discounting for Defendants’ liability and class certification defenses and the risks of
27 losing at certification, trial, or appeal, Class Counsel believe the Settlement provides significant and
28 valuable benefits to the Settlement Class Members by assuring their ability to replace a

1 malfunctioning Brush with a properly working one, and to do so with simplified warranty
2 procedures and free shipping. The Settlement also guarantees Class Members' ability to enforce
3 these obligations in this Court regardless of where they are situated, due to Defendants' submission
4 to the irrevocable jurisdiction of this Court for any disputes, as well as Class Counsel's undertaking
5 to continue advocating for them for this purpose. The Settlement therefore provides consumers with
6 the benefit of their bargains with Defendants – in a fashion that is likely more favorable than what
7 they could have secured after class certification, trial, and appeals.

8 These concrete benefits of a Settlement must be weighed against the risks and uncertainty of
9 continuing the litigation. The Defendants are extremely resourceful and represented by nationally
10 renowned attorneys who were very capable of contesting class certification and taking this matter to
11 trial. Many potential pitfalls existed which could have led to no recovery whatsoever for the Class.⁴
12 Various issues existed which might have made class certification no certain matter and proving
13 commonality would have required proof of complicated scientific testimony of the nature of the
14 alleged defect and its ability to be presented to the Jury without regard to individual issues. The
15 substance of the case itself would have led to a long and complex trial with extensive expert
16 testimony on both sides for which victory would not be assured, much less an award of damages
17 approaching the benefit of the bargain conveyed by the Settlement. Any victory would have been
18 subject to time consuming appeals, and lead to more uncertainty, while the Settlement provides
19 immediate relief.

20 Thus, the Settlement is highly reasonable when viewing the value of Plaintiff's claims in
21 light of Defendants' defenses and the high risk, expense, and complex nature of continued litigation.
22 Accordingly, the Settlement meets all criteria for final approval.

23
24
25 _____
26 ⁴As if to highlight the reality of these risks, defense counsel in this case simultaneously represented related Defendants
27 under the same corporate L'Oreal umbrella in another consumer class action, *In re Amla Litig.*, No. 1:16-cv-06953
28 (S.D.N.Y.). Unlike this case, the *Amla* case did not settle, that class was decertified, and the case dismissed shortly before
trial. *See In re Amla Litig.*, No. 1:16-cv-06593 (S.D.N.Y. Jan. 23, 2019) (Rakoff, J.). While the relief of this Settlement is
of real objective and useful value, the experience of the class members in the *Amla* Litigation leaves no room to doubt
that it is vastly superior to receiving nothing, and the importance of appreciating the tension between the assurances
provided by a good settlement, against the concrete risks of rejecting it for a perfect one.

1 **3. Class Counsel Conducted Thorough Investigation Prior to the Settlement**

2 As set forth in their preliminary approval papers and the supporting Joint Declaration, Class
3 Counsel have thoroughly investigated and researched the claims in controversy, the defenses, and
4 the developing body of law. (Joint Decl., ¶ 11.) Class Counsel's investigation entailed the retention
5 of an electrical engineering laboratory and its engineers to conduct extensive testing and forensic
6 investigation of the Brushes and to report on their findings. In addition informal exchange of
7 information, numerous telephonic conferences and in person meetings between Class Counsel and
8 Defendants' counsel, aided and further informed Class Counsel's independent research including
9 communications with class members and former employees of defendants with relevant knowledge.
10 (*Id.*)

11 The extensive negotiations with Defendants' counsel, communications with Settlement Class
12 Members and third parties, and research of the law have allowed Class Counsel to appreciate the
13 strengths and weaknesses of the claims against Defendants and the benefits of the proposed
14 Settlement. Class Counsel's diligence in evaluating and settling the Class claims is a factor
15 warranting final approval.

16 **4. Class Counsel's Experience and Views Favor Final Approval**

17 The Parties were represented by experienced class action counsel throughout the negotiations
18 resulting in this Settlement. Plaintiff was represented by Lax LLP and the Joseph J. M. Lange Law
19 Corporation, accomplished consumer class action firms experienced in litigating consumer
20 electronic class actions, and Milberg Tadler Phillips Grossman LLP, one of the country's most
21 established and respected plaintiff's firms. All such firms have recovered significant relief for their
22 clients and class members in consumer protection, antitrust and securities class actions. (Joint Dec.,
23 Exs. 1, 2 and 3 (firm resumes).) Defendants are represented by Gordon & Rees LLP, one of the
24 preeminent defense firms in the country, with a renowned – and notably successful - class action
25 defense practice group.

26 As highly experienced counsel with long, successful track records in handling consumer
27 class actions, Class Counsel believe the Settlement is fair, reasonable, and adequate, and in the best
28 interest of the Class as a whole, and also believe it is an excellent result for the Class, as explained in

1 detail in the preliminary approval papers. The endorsement of qualified and well-informed counsel
2 regarding the settlement as fair is entitled to significant weight in the final approval process. *See*
3 *Dunk*, 48 Cal. App. 4th at 1802.

4 **5. The Complete Absence of Any Objections to the Settlement Favors Final**
5 **Approval**

6 Finally, the Court may look to the response of the Settlement Class Members to help it
7 determine if the settlement is fair, adequate, and reasonable. *See 7-Eleven*, 85 Cal. App. 4th at 1153
8 (one factor that “lead[s] to a presumption the settlement was fair” is that only “a small percentage of
9 objectors” came forward). In the case at bar, the response is uniformly positive. As discussed in
10 Section II.F, above, no Settlement Class Member has submitted an Objection to, or requested
11 exclusion from, the Settlement. This response strongly indicates acceptance of the Settlement’s
12 terms by Class Members, and strongly supports court approval of the Settlement.

13 **V. CONCLUSION**

14 The Parties have negotiated a fair and reasonable settlement of claims. Having complied with
15 this Court’s Preliminary Approval Order, the Parties request that the Court grant Final Approval of
16 the Settlement, and enter the Final Approval Order.

17 **Dated: April 15, 2019**

JOSEPH J. M. LANGE LAW CORPORATION

18
19 By: 

JOSEPH J.M. LANGE
Attorney for Plaintiff
Ashley Novak

1 **PROOF OF SERVICE**

2

3 I, Joseph J. M. Lange, declare as follows:

4 I am employed in the County of Los Angeles, State of California. I am over the age of
5 eighteen and not a party to the within action. My business address is 222 North Sepulveda
Boulevard, Suite 2000, El Segundo, California 90245.

6 On **April 15, 2019**, I served the foregoing document described as **MOTION FOR FINAL**
7 **APPROVAL** on the interested parties in this action as follows:

ATTORNEY	EMAIL	PARTY
M. D. Scully Justin Lewis Gordon & Rees, L.L.P. 101 West Broadway, Suite 2000 San Diego, CA 92101	mscully@grsm.com jlewis@grsm.com	Defendants Pacific Bioscience Laboratories, Inc., and Pacific Bioscience Laboratories Products, Inc.

12 ☒ **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope addressed as above,
13 with postage thereon fully prepaid in the United States mail, at El Segundo, California. I am
14 readily familiar with the firm's practice for collection and processing of correspondence for
15 mailing. Under that practice it would be deposited with the U.S. Postal Service on the same
16 day with postage thereon fully prepaid at El Segundo, California, in the ordinary course of
business. I am aware that on motion of the party served, service is presumed invalid if the
postal cancellation date or postage meter date is more than one day after the date of deposit
for mailing contained in this affidavit. C.C.P. §1013a(3).

17 ☒ **BY ELECTRONIC MAIL:** I transmitted a copy of the foregoing document(s) this date via
18 electronic email to the email addresses shown herein.

19 ☒ I declare under penalty of perjury under the laws of the State of California that the foregoing
20 is true and correct.

21 Executed on **April 15, 2019**, at Manhattan Beach, California.

22 
23 _____
24 Joseph J. M. Lange
25
26
27
28