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10 Attorneys for the Representative Plaintiffs
11 And the Plaintiff Class

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

13 STANLEY F. SIDDLE and MICHAEL E.)
14 LIPSON, individually and on behalf of all those)
15 similarly situated,)

15 Plaintiffs,)
16 v.)

17 THE DURACELL COMPANY,)
18 COSTCO WHOLESALE CORPORATION,)
19 TECHNOMATE MANUFACTORY, LTD.,)
20 PRO-TEK INDUSTRIES, LLC.)

21 Defendants,)
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Case No. 4:19-cv-00568-JD (LB)
NOTICE OF UNOPPOSED MOTION
AND UNOPPOSED MOTION FOR
ORDER:
(1) GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT;
(2) APPOINTING CLASS COUNSEL
AND CLASS REPRESENTATIVES;
(3) APPOINTING SETTLEMENT
ADMINISTRATOR;
(4) APPROVING CLASS NOTICE

Judge: Hon. James Donato
Time: 10:00 a.m.
Date: September 24, 2020
Location Courtroom 11, 19th floor

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NOTICE OF MOTION AND MOTION

1
2 **TO THE COURT** and ALL PARTIES, in the above-entitled action and attorneys of record
3 herein:

4 **PLEASE TAKE NOTICE** that on September 24, 2020, at 10:00 a.m., or as soon thereafter
5 as the matter may be heard in Courtroom 11, on the 19th floor of the above entitled Court located at
6 450 Golden Gate Avenue, San Francisco, California, before the Honorable James Donato, Judge of
7 the United States District Court, Northern District of California, all Defendants and Representative
8 Plaintiffs will, and hereby do, move this Court for the following relief with respect to the Class
9 Action Settlement Agreement (Attached as Exhibit 1 to the Declaration of Timothy P. Rumberger
10 in Support of Joint Motion For Preliminary Approval (“TPR Decl.”)):

- 12 1) that the Court certify, for settlement purposes only, a settlement class pursuant to Federal
13 Rule of Civil Procedure 23(a) and 23(b)(3);
- 14 2) that the Court Appoint Plaintiffs STANLEY SIDDLE and MICHAEL E. LIPSON as class
15 representatives for the Settlement Class;
- 16 3) that the Court appoint The Law Offices of Timothy P. Rumberger as class counsel;
- 17 4) that the Court grant preliminary approval of the Settlement;
- 18 5) that the Court approve the distribution of Class Notice to Class Members;
- 19 6) that the Court Appoint POSTLETHWAITE & NETTERVILLE (“P&N”), as the Settlement
20 Administrator; and
- 21 7) that the Court schedule a hearing for final approval of the Settlement.

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23 This Motion is made on behalf of all parties to this litigation, and based on the following
24 Memorandum of Points and Authorities, the accompanying declarations of counsel, the exhibits
25 attached thereto, the Court’s record of this action; the oral and documentary evidence presented at
26 the hearing on the motion by counsel, and all matters of which the Court may take judicial notice.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Stanley Siddle and Michael Lipson (“Plaintiffs”)¹ and Defendant Technomate
4 Manufactory, LTD., The Duracell Company (“Duracell”), Costco Wholesale Corporation
5 (“Costco”) and Pro-Tek Industries, LLC (“Pre-Tek”) (collectively, the “Parties”), have executed a
6 Settlement of the Claims of Plaintiffs and a class of 192,000 purchasers of Duracell-branded LED
7 flashlights manufactured by Technomate. *See* Settlement Agreement (“Settlement”), Ex. 1 to the
8 Declaration of Timothy Rumberger in Support of Motion for Preliminary Approval (“TPR Decl.”)

9 The Settlement provides a common fund of \$2.2 million for: 1) the distribution to the Class
10 of cash payments; 2) Plaintiffs’ attorney’s fees, costs, and incentive awards as ordered by the
11 Court; and 3) settlement notice and administration costs. Class Members will receive payments on
12 a pro-rata basis likely between \$6 and \$8 per package of Class Flashlights purchased. Because the
13 Flashlights were sold through Costco, business records are available to provide direct notice to the
14 vast majority of Class Members, and automatic payments will be made to over 70-95% of Class
15 Members without requiring those Class Members to file a claim. P&N Decl. ¶21.

16 Plaintiffs and their counsel believe the recovery by each Class Member makes this
17 Settlement an outstanding result, particularly given the major risks faced on liability and damages.
18 The Class should be certified and the Settlement preliminarily approved as fair, reasonable, and
19 adequate. The Settlement is the product of arm’s-length negotiations, through the assistance of
20 Magistrate Judge Laurel Beeler, and falls well within the range of reasonableness. The Proposed
21 Notice Plan gives Class Members the best Notice practicable under the circumstances and full and
22 fair opportunity to evaluate the Settlement before deciding whether to participate.

23 **II. BACKGROUND**

24 **A. Factual Background**

25 This case is a putative class action brought on behalf of all Costco-member consumers who
26 purchased Duracell-branded LED flashlights, manufactured by Duracell licensee Technomate
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¹ Unless noted otherwise, capitalized terms have the same meaning as in the proposed Settlement Agreement.

1 Manufactury, packaged with Duracell batteries included, marketed in collaboration with and
2 distribution by Duracell’s retail partner Costco, within four years of the date this action was
3 initially filed, January 31, 2019. A fourth Defendant, Pro-Tek provides customer service for the
4 Flashlights. The Flashlights were sold in packages of three, which packages also included twelve
5 Duracell AAA batteries. The Flashlights sold at a regular retail price of \$19.99 and sometimes
6 were offered with a \$5 discount. The average price paid by Class Members is approximately
7 \$16.19. The operative Third Amended Complaint (“3AC”) alleges that the model 350L
8 Flashlights bearing date codes 1533, 1534 and/or 1535 are defective because they drain batteries
9 in less than 30 days when turned OFF. Plaintiffs allege claims for relief arising from alleged
10 misrepresentation and omission of material facts on Flashlight packaging, as well as breach of
11 express warranty, *i.e.* fraud/fraudulent concealment, violations of the Unfair Competition Law
12 (“UCL”), Cal. Bus. & Prof. Code §17200, *et seq.*, California’s Consumers Legal Remedies Act
13 (“CLRA”), Cal. Civ. Code §1750 *et seq.*, and breach of express warranty under California law and
14 the Magnuson-Moss Warranty Act (“MMWA”), 15 U.S.C §2301, *et seq.*

15 Technomate conducted a thorough investigation of the allegations and determined the
16 alleged defect resulted from a manufacturing anomaly during the assembly process of the
17 flashlight endcap that had the potential to cause a wire on the electronic control board (“ECB”) to
18 break, resulting in the Flashlights having the potential to draw a higher off-current than normal.
19 These Flashlights bear end-cap date-code designations 1533, 1534 and 1535, were manufactured
20 by Technomate between August 12, 2015 and August 29, 2015, and were sold by Costco. While
21 there were approximately 192,000 Duracell-branded “Durabeam Ultra” model 350-4AAA LED
22 flashlights produced and sold during this time frame, Technomate maintains that not all of these
23 flashlights are defective. These flashlights only have a *potential* for the defect to have manifested
24 during the assembly process. If the defect did not arise during assembly, it would not arise later
25 (*i.e.*, it is not a latent defect capable of arising in the future). Once identified, Technomate claims
26 to have prevented the anomaly from reoccurring by making modifications to the layout of the
27 printed circuit board and utilizing more robust electronic components on the ECB.
28

1 Costco maintains records of customer purchases, by member, identifiable by date and
2 amount paid. As such, the start date of the Class Period can be readily identified. After the defect
3 was identified and remedied, however, the Costco item number did not change for shipments of
4 later versions of the flashlights that did not include the defect (and therefore are excluded from the
5 Settlement). As a result, identifying every purchaser of Flashlights through Costco's records is
6 over-inclusive. However, using the data available, the Parties and Settlement Administrator have
7 identified the pool of potential Class Members such that Notice and Relief may be efficiently and
8 comprehensively provided to the entire Class.

9 Class Members will be comprised of Automatic Payment Recipients and Claiming
10 Recipients. As defined in the Settlement Agreement, Automatic Payment Recipients are Class
11 Members whose purchase of Flashlights occurred on or before October 23, 2015 as reflected in
12 Costco's records. Automatic Payment Recipients will receive a Settlement Payment without the
13 need to submit a Claim Form. Claiming Recipients are Class Members who are not Automatic
14 Payment Recipients and who submit an Authorized Claim consistent with the claims process and
15 whose purchase of Flashlights on or before October 23, 2015 is reflected in Costco's records.

16 **B. Procedural Background**

17 Plaintiff Stanley Siddle ("Siddle") and former plaintiff Jef Meeks ("Meeks") filed the
18 original complaint on January 31, 2019. Dkt.# 1. Siddle provided additional details about his
19 Flashlight purchases in his "Venue Declaration" filed March 11, 2019. Dkt.# 15. While motions to
20 dismiss were pending, Siddle filed the First Amended Complaint, adding as defendants Pro-Tek,
21 and Technomate. Dkt.# 35. Plaintiff Meeks also voluntarily dismissed himself from the litigation.
22 Dkt. # 34. Defendants each filed separate motions to dismiss, which the Court heard on September
23 12, 2019. The Court denied Duracell's motion to dismiss, granted the motions of Pro-Tek, P&G,
24 and Costco with leave to amend, and took Technomate's motion to dismiss for lack of personal
25 jurisdiction under submission. Dkt.# 81. On September 25, 2019, the Court referred this action to
26 Magistrate Judge Laurel Beeler to conduct a settlement conference. Dkt. # 82.
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1 On October 10, 2019, Plaintiffs Stanley Siddle and Michael Lipson (“Plaintiffs”) filed the
2 Second Amended Complaint (“2AC”), again naming Duracell, Costco, Technomate, and Pro-Tek
3 as defendants. Dkt.# 90. On October 28, 2019, the Parties stipulated to extend the time to respond
4 to the 2AC until February 7, 2020, and to delay discovery until thirty days after the Parties’ Rule
5 26(f) conference. Dkt.# 91. On January 27, 2020 the Parties stipulated to extend the time to
6 respond to the 2AC until May 7, 2020. Dkt.# 96. On May 4, 2020, the Parties stipulated to extend
7 the time to respond to the 2AC until June 22, 2020. Dkt. # 98. On June 15, 2020, the Parties
8 stipulated to extend the time to respond to the 2AC until August 6, 2020. Dkt. # 99. And on
9 August 4, 2020, the Parties stipulated to extend the time to to respond to the 2AC until September
10 5, 2020. Dkt. #101. These continuances facilitated negotiation of Settlement Agreement details.

11 **C. Informal Discovery and Settlement Conference**

12 The Parties informally exchanged discovery in advance of a settlement conference before
13 Magistrate Judge Laurel Beeler. TPR Decl. ¶8. The discovery exchanged included testing results
14 and engineering schematics from Technomate, licensing information from Duracell, and sales data
15 from Costco. *Id.* ¶8. In advance of the mediation the Parties exchanged comprehensive settlement
16 conference statements at the direction of Judge Beeler. On January 14, 2020, following a year of
17 litigation, the parties participated in a formal settlement negotiation with the Honorable Judge
18 Beeler, during an all-day Settlement Conference, with the participation of both the Plaintiffs,
19 Plaintiffs’ counsel, as well as counsel and client representatives from all Defendants. Dkt.# 94

20 **D. The Settlement Class**

21 The Parties have agreed to ask the Court to certify for settlement purposes a Class defined
22 as "All persons in the United States who purchased a three-pack of Duracell 350L flashlights
23 bearing the date code 1533, 1534, or 1535 on the flashlight end cap." Settlement ¶ 2.34. This
24 definition, while narrower than the definition proffered in the 2AC, is tailored to the alleged defect
25 in the Flashlights. The Settlement Class excludes all person in the United States who have
26 received three Replacement Flashlights from Pro-Tek. Also excluded from the Settlement Class is
27 any individual who timely and validly opts out of the Settlement Class, as well as any retailers,
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1 wholesalers, and other individuals or entities that purchased the Class Flashlights for resale, as
2 well as Defendants' current and former officers and directors, members of the immediate families
3 of Defendants' officers and directors, legal representatives, and the judicial officers to whom this
4 Action is assigned. Also excluded from the Settlement Class are any individuals to whom the
5 Notice disseminated was returned undeliverable ("RUM") by mail to the Settlement Administrator
6 and for whom there is no valid address, after reasonable efforts including skip tracing have been
7 employed to acquire a valid current physical address and/or email address, and in the absence of a
8 Claim being otherwise received from such individuals by the Administrator.

9 Costco sold approximately 192,000 units (a unit is one package of three flashlights) of
10 Class Flashlights. Most households purchased just one unit. TPR Decl. ¶21. Due to the inability to
11 identify a precise date by which all of the Flashlights at issue were sold, the Settlement
12 Administrator has been informed that Costco's sales data indicates that approximately 193,000
13 individual households should be noticed in order to reach the highest number of Class members.
14 Postlethwaite & Netterville ("P&N") Decl. ¶10.

15 **E. Proposed Notice Plan**

16 The proposed Notice Plan incorporates well-established best practices, and provides clear
17 information of the Settlement terms, the Fairness Hearing, Class Members' rights to object to or
18 opt out of the Settlement, and the request for attorneys' fees and costs. Settlement §6. The
19 Settlement Administrator, P&N, is a leading class action settlement administration firm selected
20 by the Parties to provide settlement notice and administration. P&N Director of Notice, Brandon
21 Schwartz, attests to the quality of the Notice Plan, which is expected to reach 70%-95% of Class
22 Members. P&N Decl. ¶21.

23 The Proposed Notice Plan has the following key components:

- 24 1. Email service of Class Notice to at least 47% of Class Members, and
25 U.S. mail service to the remainder, as well as to any Class Member to
26 whom email returns undeliverable; (P&N decl. ¶13)
- 27 2. The creation and maintaining of a settlement website,
28 www.flashlightsettlement.com, that will provide information about
the Settlement, provide for download of Settlement-related pleadings,

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allow claims to be submitted online by Claiming Recipients, and provide a method for Class Members to opt-out of the Settlement;

3. Long Form Notice, available online on the settlement website and by request, that contains all of the necessary Settlement and procedural information;

4. A toll-free telephone line provided by the Settlement Administrator that provides general information about the Settlement.

The Settlement Administrator was chosen jointly by the Parties following the evaluation of multiple bids. Counsel for Technomate developed key assumptions based on customer data from Costco, reached out to 4 separate settlement administrators, held conference calls, and reviewed each bid. Ludwig, decl. ¶¶3-6. The methods of notice and claims payments were consistent across all bids based on the key assumptions. *Id.* P&N bid/estimated cost of \$162,550. (P&N decl.21) Class Counsel has had no engagements with P&N in the last two years. TPR Decl. ¶ 40.

III. THE PROPOSED SETTLEMENT

The Settlement provides for a common fund of \$2.2 million, to be funded solely by Technomate. Settlement §7. The Settlement Fund will be used to pay the cost of notice and settlement administration, the Court’s award of Class Counsel’s fees and costs, any incentive awards, and Settlement Payments. *Id.* The Settlement will provide substantial monetary relief to 192,000 Class Members who purchased Flashlights. Adjusting for the cost of administration and notice, Plaintiffs’ attorney’s fees and costs, Plaintiffs estimate a Settlement Payment of \$6-\$8 per Authorized Claim. There is no reversion to any of Defendants. Any unclaimed funds remaining in the Settlement Fund will be distributed to a *cy pres* recipient. *Id.* ¶ 7.3.

IV. ARGUMENT

“Rule 23(e) directs the Court to examine the proposed settlement and make a preliminary finding of fairness,” with courts applying a strong judicial policy in favor of class settlements. *Pacheo v. JP Morgan Chase Bank, N.A.*, No. 15 Civ. 05689, 2017 WL 3335844, at *2 (N.D. Cal. Aug. 4, 2017). When a class has not yet been certified, courts will conditionally certify a class based on Rule 23’s standards, grant preliminary approval, and authorize notice to the class if “the proposed settlement (1) appears to be the product of serious, informed, noncollusive negotiations,

1 (2) has no obvious deficiencies, (3) does not improperly grant preferential treatment to class
2 representatives or segments of the class, and (4) falls with the range of possible approval.” *Id.*

3 **A. Certification of the Rule 23 Class Is Proper**

4 The proposed Settlement Class should be certified under Rule 23(a) and Rule 23(b)(3).

5 **1. Rue 23(a) Is Satisfied.**

6 First, numerosity is met, as joinder of approximately 192,000 Class Members would be
7 impractical. Fed. R. Civ. P. 23(a)(1); *see Jordan v. L.A. Cty.*, 669 F.2d 1311, 1319 (9th Cir. 1982).

8 Second, commonality is met as “there are questions of law or fact common to the class.”
9 Fed. R. Civ. P. 23(a)(2). Commonality focuses on whether there are common issues of fact or law
10 among class members and whether a class action will “generate common answers apt to drive the
11 resolution of the litigation.” *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 957 (9th Cir. 2013)
12 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Here, the many common
13 questions include whether the Class Flashlights are defective, and whether material information
14 was uniformly omitted at the point of purchase.

15 Third, Plaintiffs’ claims are typical, as they challenge the same uniform practices and allege
16 to have suffered the same injury as the Class: whether the Class Flashlights are defective. *See Fed.*
17 *R. Civ. P. 23(a)(3); Whiteway v. FedEx Kinko’s Office & Print Servs.*, No. 05 Civ. 2320, 2006 WL
18 2642528, at *6 (N.D. Cal. Sept. 14, 2006) (typicality “focuses on the similarity between the lead
19 plaintiff’s legal theories and those of the people he or she purports to represent.”).

20 Fourth, Plaintiffs have fairly and adequately protected the interests of the Class and will
21 continue to do so. Fed. R. Civ. P. 23(a)(4). Adequacy is met where a class representative: (1) has
22 common, and not antagonistic, interests with the class members, and (2) will vigorously prosecute
23 the class’ interests through qualified counsel. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th
24 Cir. 1998). Plaintiffs, purchasers of Duracell-branded flashlights manufactured by Technomate,
25 share the same interest as the Class in seeing that Flashlight purchasers receive relief for battery
26 drain issues they may have experienced with their Flashlights. Plaintiffs are also represented by
27 competent counsel with experience representing plaintiffs in class litigation. TPR Decl. ¶12.

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1 class action will achieve economies of scale for the Class, conserve judicial resources, avoid
2 repetitive proceedings, and prevent inconsistent adjudications.

3 While the 2AC sought to include all purchasers of Duracell-branded Flashlight models 250,
4 300 and 350, the 3AC proposes to certify a national class of all retail consumers who purchased
5 Duracell-branded flashlight models 350L from Costco with the date code 1533,1534, or 1535. The
6 reason for the difference in the class definitions is that investigation of the allegations revealed that
7 only a limited number of early-production 350 models had the potential to drain batteries.

8 The release effected by this Settlement is limited to the Class Members who purchased the
9 192,000 Flashlights and do not opt out. No other claims otherwise alleged in the prior complaints
10 are waived or released by the Class Members through this proposed Settlement. Settlement §10.

11 **3. Class Counsel Should Be Appointed**

12 The Court should appoint the Law Office of Timothy P. Rumberger as Class Counsel
13 under Rule 23(g). Adequacy of class counsel depends on: (1) work performed on the matter, (2)
14 experience, (3) knowledge of the law, and (4) resources counsel can commit. Fed. R. Civ. P.
15 23(g)(1)(A). Class Counsel satisfy these criteria. TPR Decl. ¶¶12-14. Plaintiffs' counsel Timothy
16 Rumberger, having 30 years of practice, litigating numerous class action cases in federal and
17 California courts, has successfully shepherded numerous cases through mediation and settlement
18 at both the state and federal level, including this current litigation, and respectfully requests the
19 Court's appointment as Class Counsel for the proposed Class for purposes of settlement here.

20 **B. Preliminary Approval Should Be Granted**

21 The Settlement satisfies preliminary approval standards, *Pacheo*, 2017 WL 3335844, at *2,
22 and Rule 23(e) standards that a settlement be "fair, reasonable, and adequate," Fed.R.Civ.P. 23(e).
23 First, the Settlement resulted from "serious, informed noncollusive negotiations." *Pacheo*, 2017
24 WL 3335844, at *2. The Parties, represented by experienced counsel, engaged in the informal
25 discovery needed to assess Defendants' potential liability, and they undertook hard-fought
26 negotiations culminating in a full-day settlement conference with Magistrate Judge Laurel Beeler
27 and weeks of negotiations over a final agreement. TPR Decl. ¶¶8-10. A settlement reached "in
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1 good faith after a well-informed arms-length negotiation” is presumed to be fair, *Fernandez v.*
2 *Victoria Secret Stores, LLC*, No. 06 Civ. 04149, 2008 WL 8150856, at *4 (C.D. Cal. July 21,
3 2008), and “[g]reat weight’ is accorded to the recommendation of counsel,” *Nat’l Rural*
4 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (quoting *In re*
5 *Painewebber Ltd. P’ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997)).

6 Second, the Settlement has no obvious deficiencies and does not provide preferential
7 treatment to any segment of the Class. *Pacheo*, 2017 WL 3335844, at *2. It provides substantial
8 relief to Class Members with Authorized Claims in the form of automatic cash payments to the
9 overwhelming majority of Class Members in the range of \$6 to \$8 per package of Flashlights.

10 Finally, the Settlement “falls with the range of possible approval,” as it provides outstanding
11 relief to the Settlement Class when considering the major risks of litigation. In assessing this
12 factor, courts consider the factors that are considered in greater detail at the final approval stage,
13 such as: (1) “the strength of the plaintiffs’ case,” “the risk, expense, complexity, and likely
14 duration of further litigation,” and “the risk of maintaining class action status throughout the trial,”
15 (2) “the amount offered in settlement,” (3) “the extent of discovery completed and the stage of the
16 proceedings,” and (4) “the experience and views of counsel.” *Hanlon*, 150 F.3d at 1026.

17 **1. Plaintiffs' Case Faced Significant Hurdles and Risk**

18 “Approval of a class settlement is appropriate when there are significant barriers plaintiffs
19 must overcome in making their case.” *Betancourt v. Advantage Human Resourcing, Inc.*, No. 14
20 Civ. 01788, 2016 WL 344532, at *4 (N.D. Cal. Jan. 28, 2016). Plaintiffs face substantial obstacles
21 on liability and damages in this action. First, this Court had dismissed all of Plaintiffs claims
22 against Costco and Pro-Tek, and this Court’s jurisdiction over Technomate is at issue. Therefore,
23 the number of viable defendants from which recovery could be sought was uncertain.

24 Second, Defendants would challenge the merits of Plaintiffs’ claims throughout the course
25 of litigation. For instance, Defendants would have disputed reliance on any statements made with
26 respect to the Flashlights as well as any alleged injury to confer standing to bring a claim. “In
27 order to establish UCL standing, plaintiffs must not only show economic injury, but must also
28

1 show that the ‘injury was the result of, i.e., *caused by*, the unfair business practice or false
2 advertising that is the gravamen of the claim.’” *McVicar v. Goodman Glob., Inc.*, 1 F. Supp. 3d
3 1044, 1052 (C.D. Cal. 2014) (quoting *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322, 120
4 Cal. Rptr. 3d 741, 750, 246 P.3d 877, 885 (2011)). Moreover, Defendants intended to--if this case
5 were to be litigated--establish that the Flashlights at issue had no written warranty under the
6 MMWA and that pre-suit notice was not properly effectuated. *See* 15 U.S.C. 2301(6)(A); Cal.
7 Com. Code §2607(3)(A). Furthermore, replacement and refund options available through Pro-Tek
8 or Costco prior to commencement of this suit may have hindered certification of Plaintiffs’ claims.

9 Plaintiffs further recognized that, consonant with the settlement at hand, their claims did
10 not stem from Duracell’s batteries, but rather from an alleged defect in the Class Flashlights.
11 Duracell would argue that no liability could result from the batteries packaged with the Flashlights
12 as the batteries included with the Flashlights contained no warranty and were not in storage when
13 installed, as required to trigger the applicable warranty.. *See Punian v. Gillette Co.*, 2016 WL
14 1029607 (N.D. Cal. Mar. 15, 2016); *Carlson v. The Gillette Co.*, No. CV 14-14201, 2015 WL
15 6453147 (D. Mass. Oct. 23, 2015). Finally, Defendants intended to prove that Plaintiffs’ claims
16 relating to the suitability of flashlights for emergencies were predicated on inactionable puffery.

17 **2. The Settlement Amount Is Appropriate**

18 “[P]erhaps the most important factor” for evaluating preliminary approval is
19 “plaintiffs’ expected recovery balanced against the value of the settlement offer.” *Cotter v. Lyft,*
20 *Inc.*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016). The Settlement is valued at \$2.2 million.

21 Plaintiffs estimate that Class Members will receive between 6 and \$8 per package on each Costco
22 member’s purchase of the specified flashlights (which sold for an average retail price of \$16.19,
23 *including* 12 AAA Duracell batteries which were *not* defective).
24

25 Given the risks the Class faced on liability, damages, and class certification, the Settlement
26 offers outstanding relief, and quite possibly greater relief than could be obtained via protracted
27 litigation. Indeed, Plaintiffs and the putative class members would have had to establish that the
28

1 alleged defect occurred in each Flashlight in each three-pack of Flashlights, and discovery to date
2 has not established that it did. Thus, while “[a] settlement can be satisfying even if it amounts to a
3 hundredth or even a thousandth of a single percent of the potential recovery,” here, the recovery is
4 a significant percentage of the potential full recovery, thereby demonstrating that it falls within the
5 range of reasonableness. *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988);
6 *see also Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998); *In re*
7 *Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 581 & n.5 (E.D. Pa. 2003) (gathering cases
8 where courts approved settlements achieving only single-digit percentages of potential recoveries).
9 *See also, In Re: Heritage Bond Litig.*, No. 02 ML 1475, 2005 WL 1594403, at *19 (C.D. Cal. June
10 10, 2005) (calling a recovery of 23% of the claimed loss after fees an “exceptional result”).

11
12 The settlement amount is further supported by the timing of the settlement. By settling
13 early, the Parties avoid substantial litigation expenses. *Schofield v. Delta Air Lines, Inc.*, No. 18-
14 cv-00382-EMC, 2019 U.S. Dist. LEXIS 31535, at *16 (N.D. Cal. Feb. 27, 2019)(opining that an
15 early settlement that avoids “great expense” makes substantial settlement recovery “appropriate”).

16
17 The difference between the potential full recovery and the anticipated Settlement Payment
18 is likely minimal. The Flashlights are not worthless. The alleged defect likely did not manifest in
19 all 192,000, and the Flashlights worked as represented when turned on. Therefore, if the average
20 price paid by consumers is \$16.19, less the value of the 12 non-defective AAA batteries, then an
21 anticipated settlement payment of \$6 to \$8 approaches full recovery. To the extent the Class
22 Payment may be less than full recovery each Class Member could receive if successful at trial, the
23 difference is far less than significant, given the risks faced by Plaintiffs as explained herein.

24 25 **3. The Parties Made an Informed Decision to Settle**

26 The touchstone of the analysis of the extent of discovery is whether “the parties have
27 sufficient information to make an informed decision about settlement.” *In re Mego Fin. Corp. Sec.*
28

1 | *Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). “[A] swift resolution does not mean the parties were
2 | unprepared to engage in settlement negotiations.” *In re Volkswagen “Clean Diesel” Mktg., Sales*
3 | *Practices, & Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2016 U.S. Dist. LEXIS 148374, 2017
4 | WL 2212783, at *16 (N.D. Cal. May 17, 2017). Here, the parties settled early in the litigation.
5 | However, they still exchanged substantial information through informal discovery in advance of the
6 | settlement conference. TPR Decl. ¶8. Plaintiffs’ counsel reviewed the testing result, engineering
7 | schematics, and sales data and used this information to successfully settle the case. *Id.*

8 | **C. The Proposed Notice Is Clear and Adequate**

9 | The proposed Notice is “reasonable” and the “best notice that is practicable under the
10 | circumstances.” Fed. R. Civ. P. 23(c)(2)(B) & (e)(1). The Notice and Claim Form are consistent
11 | with modern best practices. Notice will be disseminated by email to 47% of Class Members, and
12 | by U.S. mail to the remainder. The Notice provides the definition of the Settlement Class,
13 | describes the nature of the Settlement and its terms, identified whether the Settlement Class
14 | Member is an Automatic Payment Recipient or a Claiming Recipient, explains the procedure for
15 | making objections, provides contact information for the Settlement Administrator and Class
16 | Counsel who are available to assist Class Members, provides the internet address for the
17 | settlement website. The Notice further informs the Class that the judgment will be binding upon
18 | them if they do not opt out, provides important dates and directs Class members to the settlement
19 | website or PACER to confirm that dates have not changed. Finally, the Notice informs the
20 | Settlement Class about the Class Counsel’s request for attorneys’ fees, costs and incentive awards.

21 | Claiming Recipients, who represent “a nominal percentage of the entire class population,”
22 | the Settlement Administrator expects that approximately 3% will submit a claim. For Automatic
23 | Payment Recipients, the Settlement Administrator expects that up to 95% will accept payment.
24 | The Settlement Administrator bases the figures on its experience in similar cases.(P&N decl.¶20).

25 | **D. Class Counsel Will Apply Separately For Attorneys' Fees, Costs, and**
26 | **Service Awards**

27 | All funds not paid to counsel as Fees and Expenses, paid to Plaintiffs as approved
28 | Incentive Awards and/or paid to the Settlement Administration for the costs of notice and

1 administration shall be distributed as Settlement Payments. With respect to Class Counsel's Fees
2 & Costs, the Ninth Circuit has established a non-binding "benchmark" guideline of twenty-five
3 percent of the settlement amount. *Powers v. Eichen*, 229 F.3d. 1249, 1256 (9th Cir. 2000). In
4 deference to this Court's preferences, however, Class Counsel shall provide ample information for
5 lodestar analysis, together with admissible evidence supporting standard hourly fees requested.
6 Class counsel has agreed to cap reimbursement of out-of-pocket costs at \$44,000 equivalent to 2%
7 of the common fund, and shall provide an accounting for all expense reimbursements requested.

8 Class Counsel has advanced lodestar hours of attorney time contemporaneously logged to
9 date of more than 700 hours in the litigation of this matter, a compilation and detailed summary of
10 which will be filed with the Court in advance of the Motion for Final Approval. TPR Decl. ¶15.

11 Class Counsel is aware that service awards to class representatives for their common benefit
12 work is a practice that *this* Court normally rejects. Nevertheless, Representative Plaintiffs Stanley
13 Siddle and Michael Lipson shall each provide detailed evidence of their participation in the action,
14 including the number of hours of service provided, the nature of the work performed and the burdens
15 faced in prosecuting this action on behalf of the Settlement Class members. Class representatives
16 have each agreed to cap their requests for compensation of time spent and reimbursement of out-of-
17 pocket costs at \$2,200, equivalent to 0.1% of the common fund. Any funds not awarded to the Class
18 Representatives for his service to the Class will be distributed to the Authorized Claimants pro rata.

19 **E. Cy Pres Recipient**

20 The Settlement does not provide for a specific sum to a *cy pres* recipient. To the extent the
21 Settlement Fund has money remaining after the Settlement Administrator takes all reasonable
22 efforts to distribute the funds, the Parties have agreed to distribute the money to a *cy pres* to be
23 determined by the Court upon Final Approval, considering nominations of appropriate recipients
24 engaged in activity related to the subject matter of the lawsuit and Class Members.

25 **F. CAFA Notice**

26 28 U.S.C. § 1715 requires that within ten (10) days after a proposed settlement of a class
27 action is filed in court, each defendant that is participating in that settlement must serve on the
28

1 appropriate State and Federal officials of each state in which a class member resides a notice of
2 the proposed settlement. Here, the Settlement is nationwide in scope, and Class Members reside in
3 almost all 50 states. The Settlement Administrator will be providing notice consistent with 28
4 U.S.C § 1715.

5
6 **V. SCHEDULING A FINAL APPROVAL HEARING IS APPROPRIATE**

7 The final step in the Settlement approval process is a final fairness hearing at which the
8 Court may hear all evidence and arguments necessary to make its evaluation regarding the
9 Settlement. Counsel and objectors may explain the terms and conditions of the Settlement and offer
10 argument in support of or in opposition to the Settlement. *Manual for Complex Litigation* §21.63.

11 Plaintiffs request that the Court set a date for a hearing on the final approval on
12 approximately 120 days after the entry of the order preliminarily approving the Settlement. The
13 Parties propose the timeline attached to TPR Decl. as **Exhibit 2** to complete the Class Settlement.

14
15 **VI. CONCLUSION**

16 For all of the foregoing reasons, the parties jointly request that this Court enter an Order
17 granting preliminary approval of the Settlement Agreement, provisionally certifying the proposed
18 Settlement Class, appointing the named plaintiffs as Class Representatives, appointing Timothy
19 Rumberger as Class Counsel, appointing P&N as Settlement Administrator, approving the Class
20 Notice Plan, and scheduling the Final Approval Hearing.

21 Respectfully Submitted,

22 *Attorneys for the Representative Plaintiffs*
23 *and the Plaintiff Class(es)*

24 Dated: August 20, 2020

25 By:



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