

1 JOHNSON & WEAVER, LLP
Brett M. Weaver, Esq. (SBN 204715)
2 Frank J. Johnson, Esq. (SBN 174882)
600 West Broadway, Suite 1540
3 San Diego, CA 92101
Telephone: (619) 230-0063
4 Facsimile: (619) 255-1856
E-mail: BrettW@johnsonandweaver.com
5 E-mail: FrankJ@johnsonandweaver.com

6 Attorneys for Plaintiff Donna Zizian and
the proposed ACTIVE MEMBER CLASS

7 Joshua H. Eggnatz (Fla. Bar No. 0067926)
8 Michael J. Pascucci (Fla. Bar No. 0083397)
EGGNATZ, LOPATIN & PASCUCCI, LLP
9 5400 S. University Drive, Suite 417
Davie, FL 33328
10 Tel: (954) 889-3359
Fax: (954) 889-5913
11 Jeggatz@ELPLawyers.com
Mpascucci@ELPLawyers.com

12 Attorneys for Plaintiffs Michelle Bandell,
13 David Eglarsh, Charlene Panos, Jeanette Rawls,
Jennifer Walker and Alex Zennaro and
14 the proposed CANCELLED MEMBER CLASS

15
16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 DONNA ZIZIAN, Individually and on
behalf of all other similarly situated
19 California Residents,

20 Plaintiff,

21 v.

22 MASSAGE ENVY FRANCHISING,
LLC, a Delaware limited liability
23 company,

24 Defendant.

Case No. 16-cv-00783-DMS-BGS

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

Date: July 1, 2016
Time: 1:30 p.m.
Crtrm: 13A
Judge: Hon. Dana M. Sabraw

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MICHELE BANDELL, DAVID
EIGLARSH, CHARLENE PANOS,
JEANETTE RAWLS, JENNIFER
WALKER, and ALEX ZENNARO,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

MASSAGE ENVY FRANCHISING,
LLC, a Delaware Limited Liability
Company,

Defendant.

Case No. 16-cv-01236-DMS-BGS

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1 **I. INTRODUCTION**

2 The Court is likely familiar with PLAINTIFFS’ allegations as they are
 3 similar to those asserted by the plaintiffs in the *Hahn* Litigation.¹ PLAINTIFFS
 4 objected to the original proposed nationwide class action settlement in the *Hahn*
 5 Litigation (the “Original *Hahn* Settlement”), which purported to resolve claims
 6 on behalf of both “Current Members” and “Former Members” of a Massage
 7 Envy[®] franchise during the class period.² When ruling on those objections and
 8 considering final approval of the Original *Hahn* Settlement, the Court held that
 9 the *Hahn* plaintiffs—all of whom were Former Members at the time the Original
 10 *Hahn* Settlement was preliminarily approved (March 6, 2015)—and Class
 11 Counsel did not adequately represent the Current Members. (*Hahn* Dkt. 381.)
 12 Moreover, the *Hahn* Former Members did not include those members who
 13 cancelled, terminated, or failed to renew their membership after March 6, 2015
 14 (“CANCELLED MEMBERS”).

15 The Court also found that the Original *Hahn* Settlement was unfair
 16 because it would provide Former Members greater benefits than Current
 17 Members without adequate explanation for the disparity and without assurances
 18 of sufficient staffing at the franchise locations to accommodate the volume of
 19 requests for services by both Former Members and Current Members. *Id.*
 20 However, the Court found that the Original *Hahn* Settlement was not a coupon

21 _____
 22 ¹ *Gail Hahn, Chaille Duncan, and Alexis Hernandez, on behalf of*
 23 *themselves, individually, and all others similarly situated, v. Massage Envy*
 24 *Franchising, LLC*, Case No. 3:12-cv-00153-DMS (BGS).

25 ² In the Original *Hahn* Settlement, Former Members meant “all members of
 26 a clinic or spa owned and operated by a MEF FRANCHISEE within the United
 27 States between December 7, 2007, and [March 6, 2015] who had one or more
 28 UNUTILIZED MASSAGES when (i) he/she cancelled his/her MEMBERSHIP;
 (ii) he/she elected not to renew his/her MEMBERSHIP; or (iii) his/her
 MEMBERSHIP was terminated for non-payment, but excluding anyone whose
 MEMBERSHIP was terminated for inappropriate or illegal conduct.” Current
 Members meant “all members of a clinic or spa owned and operated by a MEF
 FRANCHISEE within the United States whose MEMBERSHIP is current as of
 [March 6, 2015].”

1 settlement, that it offered benefits to the Former Members that were fair in light
2 of the risk of delay and appeal, and that a nationwide class was appropriate for
3 settlement purposes.

4 The SETTLEMENT in these consolidated ACTIONS addresses all of the
5 concerns the Court raised. With respect to ACTIVE MEMBERS,³ the
6 SETTLEMENT affords several additional benefits that were not available to
7 them under the *Hahn* Original Settlement. First, ACTIVE MEMBERS will have
8 the opportunity to elect to receive 200% more time to utilize 75% of their
9 accrued unused member massages following membership cancellation,
10 termination, or nonrenewal. Second, ACTIVE MEMBERS will have the option
11 to choose between receiving 60 days following membership cancellation,
12 termination, or nonrenewal to use or transfer all accrued unused member
13 massages or 180 days to use 75% of them. Third, if ACTIVE MEMBERS
14 choose the 180-day option, they can change their HOME CLINIC regardless of
15 whether they have moved. Fourth, for a period of at least two years, ACTIVE
16 MEMBERS will continue to get the benefit of a program that will allow them to
17 pay a significantly reduced monthly fee while they “catch up” on accrued unused
18 massages. Fifth, to assure a better business practice going forward, MEF will
19 maintain template documents for use by Massage Envy® franchisees that clearly
20 and conspicuously disclose that any accrued but unused massages will be
21 forfeited if not used or transferred within 60 days after cancellation.

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23
24 ³ “ACTIVE MEMBERS” means members of a clinic or spa independently
25 owned and operated by a MEF FRANCHISEE within the United States whose
26 MEMBERSHIP was frozen or suspended as of June 30, 2016, including members whose
27 MEMBERSHIP was frozen or suspended as of June 30, 2016. Excluded are
28 MEF and any person, firm, trust, corporation, or other entity related to or
affiliated with MEF, LEGACY MEMBERS, and any member whose
membership was terminated for inappropriate or illegal conduct. Stipulation of
Class Action Settlement and Release (“SETTLEMENT”) ¶ I.B.

1 With respect to CANCELLED MEMBERS,⁴ the SETTLEMENT provides
 2 the same benefits afforded to Former Members in both the Original *Hahn*
 3 Settlement and the *Hahn* parties' amended settlement proposal, benefits the
 4 Court already found were fair, reasonable, and adequate.⁵ The CANCELLED
 5 MEMBERS, although also former members of a Massage Envy® Franchise,
 6 were not part of the Original *Hahn* Settlement and are also not part of the
 7 Amended *Hahn* Settlement.

8 For the reasons set forth herein, in the Court's order preliminarily
 9 approving the Original *Hahn* Settlement, and in the Court's order denying final
 10 approval of the Original *Hahn* Settlement, it is agreed that the SETTLEMENT is
 11 fair, adequate, and reasonable to the ACTIVE MEMBERS and CANCELLED
 12 MEMBERS (collectively, the "CLASS MEMBERS").

13 **II. FACTUAL AND PROCEDURAL HISTORY**

14 **A. The *Hahn* Litigation**

15 On December 7, 2011, Gail Hahn filed class claims against MEF alleging
 16 causes of action under Cal. Business and Professions Code § 17200 ("UCL") and
 17 for breach of the implied covenant of good faith and fair dealing, seeking
 18 reinstatement of membership benefits, restitution for alleged "prepaid" massages,
 19 injunctive relief, and various penalties on behalf of Former California Members.

21 ⁴ "CANCELLED MEMBERS" means all members of a clinic or spa
 22 independently owned and operated by a MEF FRANCHISEE within the United
 23 States who had one or more UNUTILIZED MESSAGES when (i) he/she
 24 cancelled his/her MEMBERSHIP; (ii) he/she elected not to renew his/her
 25 MEMBERSHIP; or (iii) his/her MEMBERSHIP was terminated for non-payment
 26 and such cancellation, termination, or non-renewal occurred between March 7,
 27 2015 and June 30, 2016. Excluded are MEF and any person, firm, trust,
 28 corporation, or other entity related to or affiliated with MEF, LEGACY
 MEMBERS, and any member whose membership was terminated for
 inappropriate or illegal conduct. (SETTLEMENT § I.I.)

⁵ The *Hahn* parties have reached an amended settlement agreement
 addressing the Court's concerns with respect to the Former Members. (Renewed
 Motion to Certify the Settlement Class as to Former Members and Finally
 Approve the Amended Settlement as to Former Members, *Hahn* Dkt. 386.)

1 (*Hahn* Dkts. 1-3.) She later added a claim for declaratory relief and two other
2 Former California Members intervened as plaintiffs. (*Hahn* Dkt. 36.) Plaintiffs
3 and the Class Members alleged that certain provisions in their membership
4 agreements, as interpreted, will cause or have caused them to lose purportedly
5 “prepaid” monthly member massages upon membership cancellation,
6 termination, or nonrenewal and thus are unlawful. (*Hahn* Dkt. 1, ¶ 14.)

7 After substantial deposition, written discovery, and motion practice, after
8 partial summary judgment was entered in the Plaintiffs’ favor against MEF, and
9 on the eve of trial, with Magistrate Judge Skomal’s assistance, on December 3,
10 2014, the parties to the *Hahn* Litigation finalized and executed a formal
11 Settlement Agreement. (Declaration of Luanne Sacks (“Sacks Decl.”) ¶¶ 11-13.)
12 On March 6, 2015, the Court preliminarily approved the Original *Hahn*
13 Settlement. (*Hahn* Dkt. 303.) The Court’s Order, *inter alia*, deemed filed the
14 Second Amended Complaint (which asserted nationwide breach of contract
15 claims on behalf of both Former Members and Current Members),⁶ vacated the
16 Summary Judgment Order, provisionally certified the *Hahn* class, and granted
17 preliminary settlement approval. (*Id.*) On March 29, 2016, the Court denied
18 final approval of the Original *Hahn* Settlement without prejudice. (*Hahn*
19 Dkt. 381.) The Court found that the parties’ notice program complied with due
20 process. (*Id.* at p. 7.)

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24 ⁶ A material term of the Original *Hahn* Settlement was the Court granting
25 the *Hahn* plaintiffs’ motion for leave to file a Second Amended Complaint to add
26 new claims for breach of contract and breach of the implied covenant of good
27 faith and fair dealing, and to expand the class definition to include a nationwide
28 Class consisting of both Current Members and Former Members of a Massage
Envy Franchise as of the date of preliminary approval. (*Hahn* Dkt. 303, p. 2.)
The Second Amended Complaint was deemed filed as of the Court’s March 6,
2015, Preliminary Approval Order. (*Id.* at p. 19.)

1 **B. The Original *Hahn* Settlement**

2 **1. Class Benefits under the Original *Hahn* Settlement**

3 Under the Original *Hahn* Settlement, Former Members who submitted a
4 reinstatement request, upon final approval would have had approximately 75% of
5 their accrued unused massages reinstated. (*Hahn* Dkt. 303, p. 5.) Current
6 Members, as of the date of preliminary approval, would have automatically
7 received an additional 30 days (for a total of 60 days) following Membership
8 conclusion in which to redeem any accrued unused massages. (*Id.*) Future
9 members of a Massage Envy[®] Franchise would benefit from injunctive relief: for
10 two years after the settlement’s effective date, MEF agreed to provide its
11 franchisees a template membership agreement, cancellation form, and sales script
12 to better disclose to potential members that any accrued unused massages would
13 be forfeited if not used within 60 days of membership cancellation, termination,
14 or nonrenewal (unless the member’s HOME CLINIC extended the redemption
15 period). (*Id.*)

16 **2. The Court Found the Benefits Afforded to Former**
17 **Members under the Original *Hahn* Settlement to Be Fair**
18 **and Adequate**

19 In its March 30, 2016 Order, the Court overruled objections that the
20 Original *Hahn* Settlement provided insufficient benefits to Former Members.
21 (*Hahn* Dkt. 381, pp. 22-24.) The Court examined those benefits and the
22 percentage of Former Members who submitted benefit claims for reinstatement,
23 balancing those benefits to the class against “the risk, expense, complexity, and
24 likely duration of further litigation and the risk of maintaining class action status
25 throughout the trial.” (*Id.* at p. 24.) Given the uncertainty of the *Hahn* plaintiffs’
26 ultimate success at trial, the likelihood that MEF would appeal an adverse
27 judgment and intermediate orders favoring plaintiffs, and the potential delay of
28 final case resolution for years in the absence of a settlement, the Court could not
“conclude that the benefits of the settlement are too small to warrant final

1 approval.” (*Id.*) Accordingly, the Court overruled the objection to the settlement
 2 based on the adequacy of its benefits. (*Id.*)

3 **3. The Court Found the Benefits Afforded Current**
 4 **Members under the Original *Hahn* Settlement Were**
 5 **Inadequate**

6 The Court found that the *Hahn* Plaintiffs, all Former Members, and Class
 7 Counsel did not “fairly and adequately protect the interests” of the Current
 8 Members, however. (*Hahn* Dkt. 381, pp. 11-13.) The Court further found that
 9 the Original *Hahn* Settlement was unfair because it would provide Former
 10 Members with greater benefits than Current Members without adequately
 11 explaining the disparity and without assurances of sufficient staffing at the
 12 Massage Envy[®] Franchises to accommodate the volume of requests for services
 13 by both Former Members and Current Members. (*Id.* at pp. 16-17.)

14 The Court further found the Original *Hahn* Settlement was unfair because
 15 the *Hahn* Plaintiffs failed to show that Class Counsel’s requested fee award of
 16 \$7.8 million was reasonable. (*Id.* at pp. 18-20.) The Court overruled all other
 17 objections to the Original *Hahn* Settlement. (*Id.* at p. 25.)

18 **C. PLAINTIFFS’ Claims and the PARTIES’ Settlement**
 19 **Discussions**

20 PLAINTIFFS and the proposed CLASS MEMBERS entered membership
 21 agreements with an independently owned and operated spa or clinic (“MEF
 22 Franchises”). Plaintiff Zizian remains a member of a MEF Franchise. (*Zizian*
 23 Dkt. 1, ¶ 5.) Plaintiffs Bandell, Eiglarsh, Panos, Rawls, Walker, and Zennaro
 24 (collectively, the “BANDELL PLAINTIFFS”) are CANCELLED MEMBERS
 25 whose MEMBERSHIPS terminated after March 6, 2015,⁷ when (i) he/she
 26 cancelled his/her MEMBERSHIP; (ii) he/she elected not to renew his/her

27 ⁷ March 7, 2015, is the day after the Court preliminarily approved the
 28 original proposed settlement in the *Hahn* Litigation. (*Hahn* Dkt. 303, dated
 March 6, 2015.)

1 MEMBERSHIP; or (iii) his/her MEMBERSHIP was terminated for cancellation,
2 termination, or non-renewal. (*Bandell* Dkt. 1, ¶¶ 31-38; Declaration of Joshua H.
3 Eggnatz (“Eggnatz Decl.”) ¶ 11.) As in *Hahn*, PLAINTIFFS, individually and
4 on behalf of putative CLASS MEMBERS, allege that certain provisions in their
5 membership agreements, as interpreted, will cause or have caused them to lose
6 purportedly “prepaid” monthly member massages upon membership
7 cancellation, termination, or nonrenewal and thus are unlawful. (*Zizian* Dkt. 1,
8 ¶ 14; *Bandell* Dkt. 1, ¶¶ 32, 39.) Also like the *Hahn* plaintiffs, Plaintiff Zizian
9 asserts causes of action for breach of contract, breach of the implied covenant of
10 good faith and fair dealing, violation of the UCL, and declaratory relief. (*Zizian*
11 Dkt. 1.) The BANDELL PLAINTIFFS assert causes of action for breach of the
12 implied covenant of good faith and fair dealing, unjust enrichment, and
13 declaratory relief. (*Bandell* Dkt. 1; Eggnatz Decl. ¶ 8.)

14 Zizian filed her Complaint two days after the Court denied final approval
15 of the Original *Hahn* Settlement on April 1, 2016, on her behalf and on behalf of
16 the ACTIVE MEMBERS. (*Zizian* Dkt. 1.) Beginning in early April 2016,
17 MEF’s counsel and Zizian’s counsel began to informally discuss settlement and,
18 pursuant to a confidentiality agreement, informally exchanged information,
19 including data regarding the ACTIVE MEMBERS (including the number of
20 ACTIVE MEMBERS and the number of UNUTILIZED MESSAGES), all
21 documents MEF produced in the *Hahn* Litigation, and transcripts of all
22 depositions of MEF witnesses and experts in the *Hahn* Litigation. (Sacks
23 Decl. ¶ 25; Declaration of Brett M. Weaver (“Weaver Decl.”) ¶ 4.)

24 Also, beginning in April, MEF’s counsel and counsel for the BANDELL
25 PLAINTIFFS separately engaged in informal settlement discussions and
26 informally exchanged information, pursuant to a separate confidentiality
27 agreement. (Eggnatz Decl. ¶ 15; Sacks Decl. ¶ 26.) During these negotiations,
28 counsel for the BANDELL PLAINTIFFS represented that he intended to file a

1 complaint on the BANDELL PLAINTIFFS' behalves and on behalf of former
2 members of a Massage Envy® Franchise who had unused accrued massages
3 when their membership was terminated, cancelled, or not renewed on or after
4 March 7, 2015 (i.e., subsequent to the class period in the *Hahn* Litigation and not
5 included in the *Hahn* Settlement). (Eggnatz Decl. ¶ 15.)

6 On May 4, 2016, MEF and Zizian participated in a mandatory settlement
7 conference before Magistrate Judge Skomal, as the Court had ordered, but were
8 unable to reach a settlement. (*Zizian* Dkt. 10; *Weaver* Decl. ¶ 5.) Following the
9 May 4 settlement conference, the PARTIES continued arm's length settlement
10 discussions and informally exchanged additional information. (*Sacks* Decl. ¶ 27;
11 *Weaver* Decl. ¶ 6.) On May 12, 2016, all of the PARTIES, including counsel for
12 the BANDELL PLAINTIFFS, participated in a second (telephonic) settlement
13 conference with Magistrate Judge Skomal. (*Zizian* Dkt. 12; *Eggnatz* Decl. ¶ 18;
14 *Sacks* Decl. ¶ 28; *Weaver* Decl. ¶ 7.) Although the PARTIES discussed an
15 overall settlement structure, no settlement was reached during the May 12, 2016,
16 settlement conference. (*Zizian* Dkt. 12; *Weaver* Decl. ¶ 7.) Thereafter, the
17 PARTIES continued to informally exchange information and continued separate
18 arm's length settlement discussions, resulting in the PARTIES negotiating and
19 agreeing upon two separate term sheets: one between MEF and Zizian on behalf
20 of herself and the ACTIVE MEMBERS and a second between MEF and the
21 BANDELL PLAINTIFFS on behalf of themselves and the CANCELLED
22 MEMBERS. (*Eggnatz* Decl. ¶ 18; *Sacks* Decl. ¶ 28; *Weaver* Decl. ¶¶ 8-9.)

23 Before the PARTIES discussed any attorneys' fees to be requested by
24 CLASS COUNSEL, PLAINTIFFS independently negotiated their respective
25 claims with the benefit of the same written discovery, depositions, and expert
26 discovery elicited over four years of litigation in the *Hahn* Litigation. (*Eggnatz*
27 Decl. ¶¶ 16, 18; *Sacks* Decl. ¶ 29; *Weaver* Decl. ¶ 9.) Zizian and MEF executed a
28 term sheet on May 19, 2016. (*Sacks* Decl. ¶ 30; *Weaver* Decl. ¶ 9.) The

1 BANDELL PLAINTIFFS and MEF separately finalized a term sheet on the
2 morning of May 20, 2016, with MEF and some of the BANDELL PLAINTIFFS
3 executing the term sheet that same morning. (Eggnatz Decl. ¶ 20; Sacks
4 Decl. ¶ 30.) All of the BANDELL PLAINTIFFS thereafter executed the term
5 sheet. (Eggnatz Decl. ¶ 20; Sacks Decl. ¶ 30.)

6 On the afternoon of May 20, 2016, the PARTIES participated in another
7 in-person settlement conference with Magistrate Judge Skomal. (*Zizian* Dkt. 13.)
8 At that settlement conference, the PARTIES engaged in further arm's length
9 discussions and ultimately agreed to an amount of attorneys' fees and costs that
10 CLASS COUNSEL would request to which MEF would not object. (Eggnatz
11 Decl. ¶ 20-21; Sacks Decl. ¶ 31; Weaver Decl. ¶ 10.)

12 Magistrate Judge Skomal agreed that the PARTIES could inform the Court
13 that he approved the process by which the SETTLEMENT was reached, and he
14 believed the SETTLEMENT addressed the concerns the Court raised when
15 denying final approval of the Original *Hahn* Settlement. Magistrate Judge
16 Skomal believed the SETTLEMENT was fair and reasonable to CLASS
17 MEMBERS, and that the amount of CLASS COUNSEL's fees and costs to
18 which MEF agreed not to object was fair and reasonable, given the Lodestar
19 estimates by counsel at the settlement conference.⁸ (Eggnatz Decl. ¶ 22; Weaver
20 Decl. ¶ 11.)

21 On May 23, 2016, the BANDELL PLAINTIFFS filed a class action
22 complaint on behalf of themselves and the CANCELLED MEMBERS, and a
23 notice of related case. (*Bandell* Dkts. 1, 2.) On May 27, 2016, the BANDELL
24 ACTION was transferred to this Court. (*Bandell* Dkt. 10.) On May 31, 2016,
25 the PARTIES filed a motion to consolidate for settlement purposes only. (*Zizian*
26 Dkt. 14; *Bandell* Dkt. 12.)

27 ⁸ Prior to filing this Motion, Magistrate Judge Skomal reviewed this
28 paragraph and agreed with its contents and with its inclusion in this Motion.

1 On June 1, 2016, Zizian filed an amended class-action complaint on behalf
2 of ACTIVE MEMBERS living anywhere in the United States. (*Zizian* Dkt. 15.)

3 **III. THE PROPOSED SETTLEMENT AND SCHEDULE OF EVENTS**

4 **A. Summary of the Settlement Terms**

5 The PARTIES have agreed to a SETTLEMENT intended to provide
6 equivalent benefits to all Massage Envy[®] members since December 7, 2007, who
7 are not included in the Amended *Hahn* Settlement. To that end, the PARTIES
8 have agreed, for settlement purposes only, to class definitions encompassing
9 “ACTIVE MEMBERS” like Plaintiff Zizian, as well as “CANCELLED
10 MEMBERS” like the BANDELL PLAINTIFFS, who were Current Members as
11 of the date of preliminary approval of the Original *Hahn* Settlement, but whose
12 membership since was cancelled, terminated, or not renewed. Specifically,
13 “ACTIVE MEMBERS” and “CANCELLED MEMBERS” are defined as:

14 **ACTIVE MEMBERS:** [M]embers of a clinic or spa
15 independently owned and operated by an MEF FRANCHISEE
16 within the United States whose membership was active as of
17 June 30, 2016, including members whose MEMBERSHIP was
18 frozen or suspended as of June 30, 2016. Excluded are MEF
19 and any person, firm, trust, corporation, or other entity related
20 to or affiliated with MEF, LEGACY MEMBERS and any
21 member whose membership was terminated for inappropriate
22 or illegal conduct.

23 **CANCELLED MEMBERS:** [A]ll members of a clinic or spa
24 independently owned and operated by an MEF FRANCHISEE
25 within the United States who had one or more UNUTILIZED
26 MASSAGES when (i) he/she cancelled his/her
27 MEMBERSHIP; (ii) he/she elected not to renew his/her
28 MEMBERSHIP; or (iii) his/her MEMBERSHIP was
terminated for non-payment and such cancellation,
termination, or non-renewal occurred between March 7, 2015,
and June 30, 2016. Excluded are MEF and any person, firm,
trust, corporation, or other entity related to or affiliated with
MEF, LEGACY MEMBERS and any member whose
membership was terminated for inappropriate or illegal
conduct.

(SETTLEMENT §§ I.B and I.I.)

1 **B. Reinstatement Benefit to Former Members not Included in the**
 2 ***Hahn* Settlement**

3 The PARTIES' proposed SETTLEMENT provides CANCELLED
 4 MEMBERS the identical benefit provided to Former Members in the Original
 5 *Hahn* Settlement (and also in the Amended *Hahn* Settlement). (*Hahn* Dkt. 381.)
 6 As in *Hahn*, those CANCELLED MEMBERS who timely submit a valid
 7 REINSTATEMENT REQUEST shall have approximately 75%, on a cumulative
 8 basis, of all accrued unused membership massages reinstated for use by them
 9 within 180 days after the REINSTATEMENT DATE at their HOME CLINIC.
 10 (*See* SETTLEMENT §§ V.9.B, V.9.C.)⁹ There are approximately
 11 398,000 CANCELLED MEMBERS who collectively have approximately
 12 2.25 million massages available for reinstatement. (Eggnatz Decl. ¶ 17; Sacks
 13 Decl. ¶ 35.)

14 The mechanism for securing reinstatement is identical to that proposed in
 15 *Hahn*: CANCELLED MEMBERS who do not exclude themselves from the
 16 SETTLEMENT can secure reinstatement by entering a UNIQUE ID CODE
 17 found on their SUMMARY NOTICE into the SETTLEMENT WEBSITE, or
 18 sending it electronically, by first class mail, or by facsimile within sixty (60)
 19 days after CLASS NOTICE is mailed/emailed to them (the "REINSTATEMENT
 20 REQUEST"). (SETTLEMENT § I.JJ.) The REINSTATEMENT REQUEST
 21 process also will enable CANCELLED MEMBERS to designate a new HOME
 22 CLINIC if they have moved more than 25 miles from their HOME CLINIC since
 23 membership cancellation, nonrenewal, or termination, which is also true in
 24 *Hahn*. (SETTLEMENT § V.9.D.)

25 ⁹ As in *Hahn*, CANCELLED MEMBERS who had one (1) UNUTILIZED
 26 MASSAGE may have one (1) 50-minute massage reinstated; Former Members
 27 who had two (2) UNUTILIZED MESSAGES may have one (1) 90-minute
 28 massage reinstated; and Former Members who had three (3) or more
 UNUTILIZED MESSAGES may have approximately 75% of his/her Unutilized
 Messages reinstated. (SETTLEMENT § V.9.A.)

1 **C. Extended Redemption Period for ACTIVE MEMBERS**

2 Under the SETTLEMENT, ACTIVE MEMBERS, who do not opt out,
3 shall automatically receive sixty (60) days after membership cancellation,
4 termination, or nonrenewal in which to use or transfer all accrued unused
5 massages, subject to the Membership Agreement's terms. (SETTLEMENT
6 § V.8.E.) Most ACTIVE MEMBERS are able to use their accrued massages
7 while their memberships remain current, and for the majority of those who do
8 not do so, sixty (60) days will be sufficient time to use all their accrued unused
9 massages. (Weaver Decl. ¶ 13.)

10 Alternatively, ACTIVE MEMBERS may elect to a 180-day period after
11 membership termination, cancellation, termination, or nonrenewal to use 75% of
12 any accrued unused massages. (SETTLEMENT § V.8.F.) ACTIVE MEMBERS
13 who choose this option cannot transfer them to a third party, but they can select a
14 new HOME CLINIC anywhere in the United States for any reason. Thus, this
15 180-day option will help satisfy the concerns of ACTIVE MEMBERS who have
16 a significant number of accrued unused massages, as well as those ACTIVE
17 MEMBERS who stopped using their massages because they were unhappy with
18 their original HOME CLINIC but have not moved more than 25 miles from their
19 original HOME CLINIC.

20 **D. Prospective Settlement Benefit**

21 For two years after the SETTLEMENT becomes effective, MEF shall
22 make and keep in place as a system standard the "FreezePlus" Program. The
23 FreezePlus program allows a member of a Massage Envy[®] Franchise with six or
24 more unused massages to remain an active member by paying a reduced monthly
25 fee in an amount to be determined by the member's HOME CLINIC, for up to a
26 six month period, during which time the member can continue to redeem any
27 accrued but unused massages without being required to make regular monthly
28 payments. (SETTLEMENT § V.8.B.) This too is intended to help ACTIVE

1 MEMBERS reduce the number of their accrued unused massages before they
2 cancel, terminate or do not renew their membership.

3 Additionally, for two years after the SETTLEMENT becomes effective,
4 MEF shall make and maintain as a system standard and provide template
5 membership agreements, cancellation forms, and talking points to the Massage
6 Envy[®] Franchisees for their use that clearly and conspicuously disclose that any
7 accrued but unused monthly membership massages will expire and will not be
8 available for use if not used or transferred within 60 days after membership
9 cancellation, termination, or nonrenewal. For two years after the
10 SETTLEMENT is effective, MEF shall make and keep in force as a system
11 standard the specific provisions in the template membership agreements,
12 cancellation forms, and talking points that clearly and conspicuously make these
13 disclosures revised disclosure provisions of the template Wellness Agreement,
14 Cancellation Form, and Talking Points that were launched on March 16, 2016,
15 and are quoted in the SETTLEMENT. (SETTLEMENT § V.8.C.)

16 **E. Release of Claims**

17 The PARTIES' negotiated release is also identical to that in the *Hahn*
18 Original Settlement (and the Amended *Hahn* Settlement). The SETTLEMENT
19 CLASS will release MEF, its franchisees, and its related entities from all
20 RELEASED CLAIMS. (SETTLEMENT §§ I.LL, XII.) RELEASED CLAIMS
21 include:

22 all claims, demands, rights, and liabilities asserted in the
23 ACTIONS including, but not limited to, claims under the common
24 laws and statutes of all fifty (50) states concerning (a) the terms
25 and conditions of the Membership Agreements between the
26 SETTLEMENT CLASS and MEF FRANCHISEES concerning the
27 cancellation, renewal, termination, and/or expiration of or ability to
28 use any UNUTILIZED MESSAGE(s); (b) alleged
misrepresentations concerning the terms and conditions of the
Membership Agreements between the SETTLEMENT CLASS and
MEF FRANCHISEES concerning the cancellation, renewal,
termination, and/or expiration of or ability to use any
UNUTILIZED MESSAGE(s); and/or (c) any fact or circumstance
that relates to the cancellation, renewal, termination, and/or

1 expiration of or ability to use any UNUTILIZED MASSAGE(s) or
2 any claim asserted or that could have been asserted in the
3 ACTIONS. The RELEASED CLAIMS include but are not limited
4 to claims that any Membership Agreement contained an illegal
5 forfeiture or liquidated damages penalty; constituted a fraudulent,
unlawful, unfair, or deceptive business practice; was
unconscionable; violated consumer protection statutes; and for
breach of contract and breach of the covenant of good faith and fair
dealing.

6 (*Id.* at § I.LL.) PLAINTIFFS and the SETTLEMENT CLASS also shall
7 expressly waive and relinquish, to the fullest extent permitted by law, solely with
8 regard to the RELEASED CLAIMS, the provisions, rights, and benefits of
9 Section 1542 of the California Civil Code and any and all provisions, rights, and
10 benefits of any similar statute or law of California or of any other jurisdiction as
11 to all known or unknown claims as against the RELEASED PARTIES. (*Id.* at
12 § XII.) The PLAINTIFFS each will provide a broader general release to MEF,
13 its franchisees, and related entities. (*Id.* at § XI.B.)

14 **F. Notice and Right to Opt Out or Object**

15 The PARTIES propose to use the same notice, exclusion, and objection
16 processes the Court approved when preliminarily approving the Original *Hahn*
17 Settlement and that the Court found in its March 30, 2016, Order complied with
18 due process. (*Hahn* Dkt. 391, pp. 6-7.) SUMMARY NOTICE will be provided
19 via email and first class mail, using language substantively identical to the
20 language the Court approved in *Hahn*. (*Compare* SETTLEMENT § VI, Ex. 5
21 *with Hahn* Dkt. 303 at pp. 8-17.)

22 **G. Service Awards**

23 Plaintiff Zizian has agreed not to request more than \$2,000 and the
24 BANDELL PLAINTIFFS have agreed not to request more than \$1,000 each as
25 SERVICE AWARDS. MEF has agreed not to object to and pay any SERVICE
26 AWARDS that do not exceed these amounts. (SETTLEMENT § XI.B.)

H. Attorneys' Fees and Costs

ACTIVE MEMBER CLASS COUNSEL and CANCELLED MEMBER CLASS COUNSEL each intends to request that the Court award them a FEE AND EXPENSE AWARD but agree that the requested award shall not exceed \$810,000 in the aggregate. (SETTLEMENT § XI.A; Eggnatz Decl. ¶ 23.) MEF has agreed not to object to and pay any request for attorneys' fees and costs to CLASS COUNSEL that does not exceed \$810,000 in the aggregate. (SETTLEMENT § XI.A.) To that end, ACTIVE MEMBER CLASS COUNSEL intends to seek a FEE AND EXPENSE AWARD that does not exceed Four Hundred Five Thousand Dollars (\$405,000), and CANCELLED MEMBER CLASS COUNSEL intends to seek a separate FEE AND EXPENSE AWARD that does not exceed Four Hundred Five Thousand Dollars (\$405,000), which MEF agrees not to oppose. (Eggnatz Decl. ¶ 23; Weaver Decl. ¶ 10.)

CLASS COUNSEL's FEE AND EXPENSE AWARD requests will be based on the value of the benefits conferred upon the respective CLASSES and CLASS COUNSEL's loadstars with reasonable multipliers. (Eggnatz Decl. ¶ 24; Weaver Decl. ¶ 16.) CLASS COUNSEL has maintained contemporaneous and detailed time keeping records. (Eggnatz Decl. ¶ 24; Weaver Decl. ¶ 16.) At the Court's discretion, CLASS COUNSEL will provide the Court their firm's time keeping records, and will have all time keeping records available for submission at the Final Approval and Fairness hearing. (Eggnatz Decl. ¶ 24; Weaver Decl. ¶ 16.) Under no circumstances will any fee and cost award reduce any benefit provided to the SETTLEMENT CLASS or the PLAINTIFFS. (SETTLEMENT § XI.A.)

I. Proposed Schedule of Events

Consistent with the provisions of the SETTLEMENT (SETTLEMENT § XIII), the following is a proposed schedule of events:

<u>Event Date</u>	<u>Event</u>
10 days following filing of motion for PRELIMINARY APPROVAL	SETTLEMENT ADMINISTRATOR serves CAFA Notice
5 days following PRELIMINARY APPROVAL	SETTLEMENT ADMINISTRATOR launches SETTLEMENT WEBSITE
14 days following PRELIMINARY APPROVAL	Last day for MEF to provide the SETTLEMENT ADMINISTRATOR with the list of CLASS MEMBERS to provide CLASS NOTICE
45 days after PRELIMINARY APPROVAL	NOTICE DATE
14 days prior to OBJECTION/EXCLUSION DEADLINE	Last day for CLASS COUNSEL to file their applications for a FEE AND EXPENSE AWARD and SERVICE AWARD
60 days following NOTICE DATE	The REINSTATEMENT REQUEST DEADLINE/ELECTION OF BENEFIT DEADLINE and the OBJECTION/EXCLUSION DEADLINE
15 days following the OBJECTION/EXCLUSION DEADLINE	Last day for the SETTLEMENT ADMINISTRATOR to provide the list of CLASS MEMBERS who submitted valid exclusion requests to CLASS COUNSEL and MEF's COUNSEL
45 days following the OBJECTION/EXCLUSION DEADLINE	Last day for PLAINTIFFS to submit any motion and supporting documentation/evidence to the COURT in support of FINAL APPROVAL (including evidence by the ADMINISTRATOR concerning the effectiveness of CLASS NOTICE) and any supplemental briefing on their request for a FEE AND EXPENSE AWARD and/or INCENTIVE AWARD
To be set by Court	FINAL APPROVAL HEARING
5 business days following the EFFECTIVE DATE	MEF to pay FEE AND EXPENSE AWARD and SERVICE AWARD
30 days following the EFFECTIVE DATE	REINSTATEMENT DATE

<u>Event Date</u>	<u>Event</u>
180 days following the EFFECTIVE DATE	Deadline for CLASS COUNSEL to return documents provided by MEF
180 days following the REINSTATEMENT DATE	Last day of period for eligible CANCELLED MEMBERS of the SETTLEMENT CLASS to redeem reinstated massages
210 days following the EFFECTIVE DATE	SETTLEMENT ADMINISTRATOR must remove SETTLEMENT WEBSITE and transfer domain name to MEF

J. CAFA Notice

The SETTLEMENT ADMINISTRATOR will serve notice of this SETTLEMENT to appropriate state and federal officials pursuant to the Class Action Fairness Act (“CAFA”) at 28 U.S.C. § 1715. (SETTLEMENT § VI.13.I.) The SETTLEMENT ADMINISTRATOR will be responsible for drafting and preparing the notice in conformity with 28 U.S.C. § 1715, and for identifying the appropriate state and federal officials to be notified. (*Id.*)

IV. LEGAL ANALYSIS

A. Applicable Legal Standards

Federal Rule of Civil Procedure 23 requires judicial approval of the proposed class action settlement. The procedure for securing such judicial approval is well established and is comprised of the following:

- (1) Certification of a settlement class and preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval.
- (2) Dissemination of notice of the proposed settlement to the affected class members.
- (3) A formal fairness hearing, or final settlement approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement are presented.

1 See Manual for Complex Litigation, Fourth (Fed. Jud. Center 2004), §§ 21.63 *et*
2 *seq.* This procedure safeguards class members’ procedural due process rights
3 and enables the Court to fulfill its role as guardian of class interests. See
4 A. Conte & H. B. Newberg, *Newberg on Class Actions*, § 11.22 *et seq.* (4th ed.
5 2002) (“Newberg”).

6 At this juncture and with this motion, PLAINTIFFS respectfully request
7 that the Court take the first steps in the settlement approval process by granting
8 preliminary approval of the proposed SETTLEMENT; provisionally certifying
9 the proposed CLASSES; and directing that NOTICE be disseminated to the
10 CLASSES pursuant to the proposed notice program.

11 At the preliminary approval stage, the Court need only “make a
12 preliminary determination of the fairness, reasonableness and adequacy of the
13 settlement” so that notice of the Settlement may be given to the Class and a
14 fairness hearing may be scheduled to make a final determination regarding the
15 fairness of the Settlement. See Newberg, § 11.25. In so doing, the Court reviews
16 the Settlement to assess that it is not collusive and, “taken as a whole, is fair,
17 reasonable and adequate to all concerned.” *Officers for Justice v. Civil Serv.*
18 *Comm.*, 688 F.2d 615, 625 (9th Cir. 1982); see also *Rodriguez v. West Publ’g*
19 *Co.*, 563 F.3d 948, 965 (9th Cir. 2009).

20 **B. Certification of the Proposed Settlement Classes is Appropriate**

21 Certification of the proposed CLASSES is appropriate because Rule 23(a)
22 and Rule 23(b)(3) are satisfied.

23 **1. Rule 23(a) is Satisfied**

24 **a. The CLASSES are Too Numerous to Permit**
25 **Joinder**

26 A case may be certified as class action only if “the class is so numerous
27 that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). While
28 there is no fixed rule, numerosity is generally presumed when the potential

1 number of class members reaches 40. *Jordan v. County of Los Angeles*, 669 F.2d
2 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982).

3 Here, MEF estimates that there are approximately 1.6 million ACTIVE
4 MEMBERS and approximately 398,000 CANCELLED MEMBERS. (Eggnatz
5 Decl. ¶ 17; Sacks Decl. ¶ 35; Weaver Decl. ¶ 4.) Accordingly, the classes are
6 sufficiently numerous.

7 **b. These ACTIONS Present Common Questions of**
8 **Law or Fact**

9 Rule 23(a)(2) requires that there be one or more questions common to a
10 class. *See Hanlon v. Chrysler Corp*, 150 F.3d 1011, 1019 (9th Cir. 1998);
11 1 H. Newberg & A. Conte, *Newberg on Class Actions* § 3.10 (3d ed. 1992); *see*
12 *also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011). Because
13 PLAINTIFFS’ allegations and causes of action are virtually identical to those in
14 *Hahn*, the same common questions found there exist here. As in *Hahn*,
15 PLAINTIFFS’ “breach of contract claim is based on the allegation that forfeiture
16 of unused pre-paid massages constitutes a breach of the refund provision in the
17 membership agreement.” (*Hahn* Dkt. 303, p. 3.) PLAINTIFFS here, like the
18 *Hahn* plaintiffs, allege that their and all of the CLASS MEMBERS’ membership
19 agreements regarding forfeiture of unused accrued massages are functionally
20 uniform across the United States. (*Hahn* Dkt. 160, p. 13.)

21 Moreover, “variations [in state law] are irrelevant to certification of a
22 settlement class since a settlement would eliminate the principal burden of
23 establishing the elements of liability under disparate laws.” *Sullivan v. DB Invs.,*
24 *Inc.*, 667 F.3d 273, 303 (3d Cir. 2011) (*en banc*). In any event, “the law relating
25 to the element of breach [of contract] does not vary greatly from state to state” to
26 defeat “commonality.” *In re Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg.*
27 *Litig.*, 270 F.R.D. 521, 529 (N.D. Cal. 2010) (granting certification of nationwide
28 class on breach of contract and declaratory judgment claims).

1 Accordingly, as in *Hahn*, “[t]he legal and factual issues relevant to the
2 contract claims are [] sufficiently uniform to meet the commonality and
3 predominance requirements” of Rule 23. (*Hahn* Dkt. 303, p. 3.)

4 **c. PLAINTIFFS’ Claims are Typical of Those of the**
5 **CLASSES**

6 Rule 23(a)(3) requires that “the claims and defenses of the representative
7 parties are typical of the claims or defenses of the class.” Fed. R. Civ. P.
8 23(a)(3). Typicality does not require total identity between representative
9 plaintiffs and class members. *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir.
10 2001), *abrogated on other grounds by Johnson v California*, 543 U.S. 499, 504-
11 05 (2005). Rather, typicality is satisfied so long as the named plaintiffs’ claims
12 stem “from the same event, practice, or course of conduct that forms the basis of
13 the class claims, and is based upon the same legal theory.” *Jordan*, 669 F.2d at
14 1322; *In re Juniper Networks Sec. Litig.*, 264 F.R.D. 584, 589 (N.D. Cal. 2009)
15 (“representative claims are ‘typical’ if they are reasonably co-extensive with
16 those of absent class members”) (citation omitted).

17 Here, the named PLAINTIFFS’ claims stem from the same common
18 course of conduct as the claims of the CLASS MEMBERS—the interpretation
19 and alleged breach of their Massage Envy[®] membership agreements. Each
20 ACTIVE MEMBER, including Plaintiff Zizian, alleges the same future loss of
21 accrued unused massages. (*Zizian* Dkt. 1, ¶¶ 13-14, 20.) Each CANCELLED
22 MEMBER, including each of the BANDELL PLAINTIFFS, alleges that (s)he
23 has already lost accrued unused massages. (*Bandell* Dkt. 1, ¶¶ 33-38; Eggnatz
24 Decl. ¶¶ 10-25.) Thus, the named PLAINTIFFS’ claims are typical of the
25 respective CLASS MEMBERS they seek to represent because they arise from
26 the same course of conduct that forms the basis of the CLASSES’ claims and are
27 based upon the same theories of liability. As such, Rule 23(a)(3) is satisfied.

28

1 **d. PLAINTIFFS and CLASS COUNSEL Will Fairly**
2 **and Adequately Protect the Interests of the CLASS**
3 **MEMBERS**

4 Rule 23(a)(4) requires that representative plaintiffs will “fairly and
5 adequately” protect the interests of a class. The two-prong test for determining
6 adequacy is: “(1) Do the representative plaintiffs and their counsel have any
7 conflicts of interest with other class members?; and (2) will the representative
8 plaintiffs and their counsel prosecute the action vigorously on behalf of the
9 class?” *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Hanlon*, 150
10 F.3d at 1020. Both prongs are satisfied here. The proposed CLASSES and
11 named PLAINTIFFS remedy the Original’s *Hahn* Settlement’s failure to comply
12 with Rule 23(a)(4).

13 First, the ACTIVE MEMBERS in the ZIZIAN ACTION are represented
14 by Plaintiff Zizian, whose membership is active, and the CANCELLED
15 MEMBERS in the BANDELL ACTION are represented by the BANDELL
16 PLAINTIFFS, each of whom terminated his or her Massage Envy membership
17 after March 6, 2015. Accordingly, the interests of the CLASSES and the named
18 PLAINTIFFS are aligned.

19 Second, the PLAINTIFFS and CLASS COUNSEL have separately
20 secured proposed SETTLEMENT benefits for the CLASSES that are equivalent
21 to those warranting final settlement approval for the *Hahn* Former Members.
22 (Renewed Motion for Final Settlement Approval, *Hahn* Dkt. 386.) The ACTIVE
23 MEMBERS and CANCELLED MEMBERS were separately represented, and
24 separate term sheets were independently negotiated before the PARTIES
25 negotiated CLASS COUNSELS’ FEE AND EXPENSE AWARD. Moreover,
26 CLASS COUNSEL have extensive experience litigating and settling class
27 actions, including consumer cases throughout the United States.
28 (Eggnatz Decl. ¶ 19; Weaver Decl. ¶ 14.) CLASS COUNSEL are well qualified
to represent the CLASSES and will continue to vigorously protect the

1 CLASSES' interests and maximize the recovery for all CLASS MEMBERS as
2 evidenced by, *inter alia*, CLASS COUNSEL's objections to the Original *Hahn*
3 Settlement on behalf of PLAINTIFFS and CLASS COUNSEL's negotiations on
4 behalf of the CLASSES in three separate settlement conferences with Magistrate
5 Judge Skomal. (Eggnatz Decl. ¶¶ 26, 31; Weaver Decl. ¶¶ 5, 7, 10, 15 .)

6 **2. The Requirements of Rule 23(b)(3) are Satisfied**

7 In addition to the requirements of Rule 23(a), at least one of the prongs of
8 Rule 23(b) must be satisfied. Here, the proposed CLASSES satisfy
9 Rule 23(b)(3), which permits a class action if the Court finds that "questions of
10 law or fact common to class members predominate over any questions affecting
11 only individual members, and that a class action is superior to other available
12 methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ.
13 P. 23(b)(3).

14 **a. Common Questions of Law or Fact Predominate**

15 In analyzing the predominance factor, the Supreme Court has defined this
16 inquiry as establishing "whether proposed classes are sufficiently cohesive to
17 warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S.
18 591, 622 (1997). The predominance inquiry examines "whether the shared
19 attributes will be the main focus of the litigation." *Barragan v. Evanger's Dog*
20 *& Cat Food Co.*, 259 F.R.D. 330, 334 (N.D. Ill. 2009) (citing *Amchem Prods.*,
21 521 U.S. at 623-24). Importantly, "[w]hen a proposed class challenges a uniform
22 policy, the validity of that policy tends to be the predominant issue in the
23 litigation." *Nicholson v. UTI Worldwide, Inc.*, No. 3:09-cv-722-JPG-DGW,
24 2011 U.S. Dist. LEXIS 49890, at *19 (S.D. Ill. 10, 2011) (internal quotation
25 marks and citations omitted) (finding defendant's policy of not paying overtime
26 predominated). "Although the extent of each class member's personal damages
27 might vary," this does not defeat commonality if there are substantial common
28

1 issues that outweigh the single variable of damage amounts. *Arreola v. Godinez*,
2 546 F.3d 788, 801 (7th Cir. 2008).

3 The common issues in these ACTIONS vastly outweigh any individual
4 issues. The common issues, as set forth above in Section IV(B)(1)(b) , arise
5 from an alleged common course of conduct. As in *Hahn*, “[t]he legal and factual
6 issues relevant to the [classes’] contract claims are [] sufficiently uniform to meet
7 the commonality and predominance requirements” of Rule 23. (*Hahn* Dkt. 303,
8 p. 3.)

9 **b. A Class Action is the Superior Method of**
10 **Adjudication**

11 The second prong of Rule 23(b) is satisfied by the proposed
12 SETTLEMENT. As the Court explained when overruling manageability
13 objections to the Original *Hahn* Settlement, “Class action manageability . . . is
14 not considered when class certification is sought solely for settlement purposes.”
15 (*Hahn* Dkt. 381, p. 14, citing *Amchem Prods.*, 521 U.S. at 620.) Thus, any
16 manageability problems that may have existed are eliminated by the proposed
17 SETTLEMENT. There will be no trial now.

18 **C. Preliminary Approval of the SETTLEMENT is Appropriate**

19 Public policy “strong[ly] . . . favors settlements, particularly where
20 complex class action litigation is concerned.” *Pilkington v. Cardinal Health*,
21 *Inc.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Churchill Village, L.L.C. v. Gen.*
22 *Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*,
23 955 F.2d 1268, 1276 (9th Cir. 1992). “[T]he decision to approve or reject a
24 settlement is committed to the sound discretion of the trial judge because he is
25 exposed to the litigants and their strategies, positions, and proof.” *Hanlon*,
26 150 F.3d at 1026.

27 In exercising such discretion, the Court should give “proper deference to
28 the private consensual decision of the parties . . . [T]he court’s intrusion upon

1 what is otherwise a private consensual agreement negotiated between the parties
2 to a lawsuit must be limited to the extent necessary to reach a reasoned judgment
3 that the agreement is not the product of fraud or overreaching by, or collusion
4 between, the negotiating parties, and that the settlement, taken as a whole, is fair,
5 reasonable and adequate to all concerned.” *Hanlon*, 150 F.3d at 1027; *see also*
6 Fed. R. Civ. P. 23(e)(2). Importantly, “[b]ecause class members will
7 subsequently receive notice and have an opportunity to be heard on the
8 settlement, [a] Court need not review the settlement in detail at [the preliminary
9 approval stage]; instead, preliminary approval is appropriate so long as the
10 proposed settlement falls ‘within the range of possible judicial approval.’” *In re*
11 *M.L. Stern Overtime Litig.*, Case No. 07-CV-0118-BTM (JMA), 2009 U.S. Dist.
12 LEXIS 31650, at *9-10 (S.D. Cal. April 13, 2009) (quoting Newberg § 11.25).

13 The proposed SETTLEMENT satisfies the preliminary approval standard
14 because: (a) it is within the range of possible approval; (b) there is no reason to
15 doubt its fairness because it is the product of hard-fought, arm’s length
16 negotiations between the PARTIES and was only reached after three different
17 settlement conferences before Magistrate Judge Skomal with the Magistrate
18 Judge’s assistance; and (c) PLAINTIFFS and CLASS COUNSEL believe it is in
19 the best interest of the CLASSES.

20 **1. The SETTLEMENT Affords the Classes Benefits Upheld**
21 **in *Hahn* as Fair, Reasonable, and Adequate**

22 “A class action settlement may be approved ‘only after a hearing and on
23 finding that it is fair, reasonable, and adequate.’” (*Hahn* Dkt. 381, citing
24 Rule 23(e)(2).) Determining whether a settlement is “reasonable” is not
25 susceptible to a mathematical equation yielding a particularized sum. *In re Med.*
26 *Ex-Ray Film Antitrust Litig.*, CV-93-5904, 1998 U.S. Dist. LEXIS 14888, at *15
27 (E.D.N.Y. Aug. 7, 1998); *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)
28 (“[I]n any case there is a range of reasonableness with respect to a settlement—a

1 range which recognizes the uncertainties of law and fact in any particular case
2 and the concomitant risks and costs necessarily inherent in taking any litigation
3 to completion.”). As such,

4 [t]he fact that a proposed settlement may only amount to a fraction
5 of the potential recovery does not, in and of itself, mean that the
6 proposed settlement is grossly inadequate and should be
7 disapproved. . . . In fact there is no reason, at least in theory, why
8 a satisfactory settlement could not amount to a hundredth or even a
9 thousandth part of a single percent of the potential recovery.

10 *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 & n.2 (2d Cir. 1974)
11 (citations omitted), *abrogated on other grounds by Goldberger v. Integrated*
12 *Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

13 Overruling an objection that the *Hahn* settlement provided insufficient
14 benefits to Former Members, the Court noted it considered the benefits modest,
15 particularly given the strength of the plaintiffs’ case and the fact that 4.6 percent
16 of Former Members submitted claims for those benefits. (*Hahn* Dkt. 381, p. 23.)
17 Nonetheless, the Court recognized that it “must consider additional factors, such
18 as the risk, expense, complexity, and likely duration of further litigation and the
19 risk of maintaining class action status throughout the trial.” (*Id.* at p. 24.) The
20 Court emphasized that the *Hahn* plaintiffs’ ultimate success at trial was
21 uncertain, that MEF would appeal an adverse judgment and intermediate orders
22 favoring plaintiffs, and that final resolution would be delayed for years in the
23 absence of a settlement. (*Id.*) In light of those risks, the Court could not
24 “conclude that the benefits of the settlement are too small to warrant final
25 approval.” Accordingly, the Court overruled the objection to the *Hahn* Original
26 Settlement based on the adequacy of its benefits to *Hahn* class members. (*Id.*)

27 The analysis is the same here. As explained in Sections III.B and III.C
28 above, the SETTLEMENT offers the same benefit to ACTIVE CLASS
MEMBERS and CANCELLED CLASS MEMBERS as was offered in the
Original *Hahn* Settlement—the opportunity to redeem approximately 75% of

1 unused accrued massages for a 180 day period following membership
2 cancellation, termination, or nonrenewal. And as was true in *Hahn*, those
3 benefits represent PLAINTIFFS' compromise in light of the risks of continued
4 litigation, including (i) the risk that potential offsets could reduce any recovery or
5 restitution; (ii) the risk that any such recovery or restitution would be undercut by
6 the costs of attorneys' fees and expenses (which MEF will pay under the
7 SETTLEMENT); (iii) the risk that PLAINTIFFS would be unable to secure or
8 maintain class certification through trial; and (iv) the significant likelihood that
9 MEF would appeal an adverse judgment, resulting in delayed resolution of
10 PLAINTIFFS' claims.

11 In sum, the SETTLEMENT provides substantial relief to all CLASS
12 MEMBERS based on the strengths of their respective claims without delay and
13 is within the range of reasonableness, particularly in light of the above risks that
14 CLASS MEMBERS would face in litigation.

15 **2. The SETTLEMENT is Based on the Same Discovery**
16 **Completed in *Hahn* Plus the PARTIES' Informal**
17 **Discovery**

18 The PARTIES were able to fully assess the relative strengths and
19 weaknesses of their respective positions and to compare the benefits of the
20 proposed SETTLEMENT with the costs and risks of protracted litigation because
21 PLAINTIFFS' allegations are virtually identical to those in *Hahn*, and MEF
22 provided PLAINTIFFS the *Hahn* discovery elicited during four years of
23 litigation, plus additional informal discovery PLAINTIFFS requested.
(Eggnatz Decl. ¶ 16; Sacks Decl. ¶ 23; Weaver Decl. ¶ 4, 6, 8.)

24 **3. The Proposed SETTLEMENT was Achieved Through**
25 **Arm's Length Negotiation During Three Settlement**
26 **Conferences with Magistrate Judge Skomal**

27 It is presumed that a proposed settlement is fair and reasonable when it is
28 the result of arm's length negotiations. *Rodriguez*, 563 F.3d at 965 ("We put a
good deal of stock in the product of an arms-length, non-collusive, negotiated

1 resolution”); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1171
2 (S.D. Cal. 2007) (“[T]he fact that the settlement agreement was reached in arm’s
3 length negotiations after relevant discovery [has] taken place create[s] a
4 presumption that the agreement is fair.”); *see also Boyd v. Bechtel Corp.*, 485 F.
5 Supp. 610, 622 (N.D. Cal. Aug. 22, 1979) (“The recommendations of plaintiffs’
6 counsel should be given a presumption of reasonableness.”); Newberg § 13:14.

7 CLASS COUNSEL and MEF’s COUNSEL have extensive combined
8 experience in consumer class action litigation. (Eggnatz Decl. ¶ 26;
9 Weaver Decl. ¶ 14.) CLASS COUNSEL on behalf of the PLAINTIFFS raised
10 objections sufficient to persuade the Court to deny final approval of the Original
11 *Hahn* Settlement, and thereafter zealously negotiated with MEF’s COUNSEL on
12 behalf of the CLASSES. The PARTIES reached a SETTLEMENT only after
13 three conferences before Magistrate Judge Skomal and only with the Magistrate
14 Judge’s assistance.

15 Magistrate Judge Skomal agreed that the PARTIES could inform the Court
16 that he approved the process by which the SETTLEMENT was reached, and he
17 believed the SETTLEMENT addressed the concerns the Court raised when
18 denying final approval of the Original *Hahn* Settlement. Magistrate Judge
19 Skomal believed the SETTLEMENT was fair and reasonable to CLASS
20 MEMBERS, and that the amount of CLASS COUNSEL’s fees and costs to
21 which MEF agreed not to object was fair and reasonable, given the Lodestar
22 estimates by counsel at the settlement conference. (Eggnatz Decl. ¶ 22; Weaver
23 Decl. ¶ 11.)

24 4. CLASS COUNSEL Will Request Fee and Service Awards 25 at the Final Approval Hearing

26 At the Final Approval Hearing, CLASS COUNSEL will ask the Court to
27 award fees and expenses based upon the value of the SETTLEMENT benefits
28 secured for the respective CLASSES and will support that request with itemized

1 time and expense records, as requested by the Court, and a corresponding
2 lodestar analysis. (Eggnatz Decl. ¶ 24; Weaver Decl. ¶ 16.) The requested
3 attorneys' fees will not diminish the value of the CLASSES' SETTLEMENT
4 benefits. (SETTLEMENT § XI.A.) CLASS COUNSEL has agreed not to
5 request a fee and cost award that exceeds \$810,000 in the aggregate. MEF has
6 agreed not to object and to pay any fee and cost award that does not exceed
7 \$810,000 in the aggregate. (SETTLEMENT § XI.A.)

8 In addition, CLASS COUNSEL will ask the Court to grant SERVICE
9 AWARDS to the PLAINTIFFS, not to exceed \$2,000 for Plaintiff Zizian and
10 \$1,000 for each of the BANDELL PLAINTIFFS. MEF has agreed not to object
11 to and to pay any SERVICE AWARDS that do not exceed these amounts.
12 (SETTLEMENT § XI.B.)

13 **D. The Proposed Notice and Notice Program are Identical to Those**
14 **Approved in *Hahn***

15 As noted above in Section III.F, the PARTIES propose to use CLASS
16 NOTICE identical to those approved in *Hahn*. The proposed SUMMARY
17 NOTICE incorporates the extensive revisions set forth in the Court's *Hahn*
18 preliminary approval order. (*Hahn* Dkt. 303.) The SUMMARY NOTICE sets
19 forth the procedure for submitting claims, requests for exclusion, objections to
20 the SETTLEMENT, and a timeline for processing claims. (SETTLEMENT
21 § VI, Ex. 5.) The SUMMARY NOTICE further explains in plain language the
22 nature of the ACTIONS, the class definitions and claims, the issues and defenses
23 presented in the ACTIONS, how CLASS MEMBERS can appear through
24 individual counsel, the terms of the SETTLEMENT, and the binding nature of a
25 class judgment. (*Id.*) The SUMMARY NOTICE directs CLASS MEMBERS to
26 the SETTLEMENT WEBSITE, including a LONG FORM NOTICE also
27 modeled on the long form notice approved in *Hahn*. (SETTLEMENT § VI,
28 Ex. 2.) The procedure for disseminating the SUMMARY NOTICE is the same

1 as in *Hahn*, where 98% of class members received direct summary notice. (*Id.*
2 § VI; *Hahn* Dkt. 381, p. 5.)

3 Accordingly, both the form and manner of CLASS NOTICE proposed
4 here fulfill all of the requirements of Rule 23 and due process, and PLAINTIFFS
5 request that the Court direct that notice of the proposed SETTLEMENT be given
6 to the CLASSES consistent with the terms of the SETTLEMENT.

7 **V. CONCLUSION**

8 For the foregoing reasons, PLAINTIFFS respectfully request that the
9 Court issue an Order:

- 10 (a) Granting approval of the proposed Class Action SETTLEMENT
11 entered into between the PARTIES;
- 12 (b) Provisionally certifying the ACTIVE MEMBER Class and
13 CANCELLED MEMBER Class as defined in the SETTLEMENT;
- 14 (c) Appointing Plaintiff Zizian as Class Representative of the proposed
15 ACTIVE MEMBER Class;
- 16 (d) Appointing Plaintiffs Bandell, Eiglarsh, Panos, Rawls, Walker, and
17 Zennaro as Class Representatives of the proposed CANCELLED
18 MEMBER Class;
- 19 (e) Appointing Frank Johnson and Brett Weaver of Johnson & Weaver,
20 LLP as ACTIVE MEMBER CLASS COUNSEL;
- 21 (f) Appointing Joshua H. Eggnatz, Michael J. Pascucci, and Benjamin
22 M. Lopatin of Eggnatz, Lopatin, Pascucci, LLP as CANCELLED
23 MEMBER CLASS COUNSEL;
- 24 (g) Approving the PARTIES' proposed notice program, including the
25 proposed forms of notice set forth in the SETTLEMENT, and
26 directing that notice be disseminated pursuant to such program;
- 27 (h) Appointing The Garden City Group, LLC ("Garden City Group") as
28 SETTLEMENT ADMINISTRATOR, and directing Garden City
Group to carry out the duties and responsibilities of the
SETTLEMENT ADMINISTRATOR specified in the
SETTLEMENT;
- (i) Staying all non-SETTLEMENT related proceedings in the
ACTIONS and any other actions that may be filed asserting claims
similar to those raised in the ACTIONS pending final approval of
the SETTLEMENT;
- (j) Enjoining any members of the proposed classes from pursuing
claims subject to the SETTLEMENT in any other judicial,

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administrative, arbitral or other forum pending a final determination regarding whether the SETTLEMENT should be approved; and

- (k) Setting a FINAL APPROVAL HEARING and certain other dates in connection with the final approval of the SETTLEMENT.

Respectfully submitted,

Dated: June 3, 2016

JOHNSON & WEAVER, LLP

By: *s/ Brett M. Weaver*

BRETT M. WEAVER

FRANK J. JOHNSON
600 West Broadway, Suite 1540
San Diego, CA 92101
Tel: 619-230-0063
Fax: 619-255-1856
brettw@johnsonandweaver.com
frankj@johnsonandweaver.com

Attorneys for Plaintiff Donna Zizian and the proposed ACTIVE MEMBER CLASS

Dated: June 3, 2016

EGGNATZ, LOPATIN & PASCUCCI, LLP

By: *s/ Joshua H. Egnatz*

JOSHUA H. EGGNATZ

MICHAEL J. PASCUCCI
BENJAMIN M. LOPATIN
5400 S. University Drive, Suite 417
Davie, FL 33328
Tel: (954) 889-3359
Fax: (954) 889-5913
Jeggnatz@ELPLawyers.com
Mpascucci@ELPLawyers.com

Attorneys for Plaintiffs Michele Bandell, David Eigliarsh, Charlene Panos, Jeannette Rawls, Jennifer Walker, and Alex Zennaro and the proposed CANCELLED MEMBER CLASS

Filer's Attestation: Pursuant to Section 2.f.4 of the ECF Administrative Policies and Procedures Manual for the Southern District of California, Brett M. Weaver hereby attests that concurrence in the filing of this document has been obtained.