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13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **FOR THE COUNTY OF ALAMEDA**

15 HOWARD CLARK, individually, on behalf  
16 of all others similarly situated, and the  
17 general public,

18 Plaintiff,

19 v.

20 S.C. JOHNSON & SON, INC., a Wisconsin  
21 Corporation; DOES 1-1000, inclusive,

22 Defendants.

Case No. RG20067897

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF’S MOTION FOR FINAL  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

Date: December 7, 2021

Time: 10:00 a.m.

Dept.: 23

Judge: Hon. Michael M. Markman

Reservation Number: R-2275900

**PUBLIC-REDACTS MATERIALS FROM  
CONDITIONALLY SEALED RECORD**

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1 **I. INTRODUCTION**

2 On July 9, 2021, this Court granted preliminary approval of a proposed nationwide class action  
3 settlement (the “Settlement”) between Plaintiff Howard Clark (“Plaintiff”) and Defendant S.C. Johnson  
4 & Son, Inc. (“Defendant” or “SC Johnson”). Plaintiff now respectfully requests that the Court grant final  
5 approval of the Settlement and enter the [Proposed] Final Approval Order and Judgment submitted  
6 herewith.

7 The Settlement merits final approval. Under its terms, S.C. Johnson has agreed to the following  
8 monetary and injunctive relief on behalf of the Settlement Class:<sup>1</sup>

- 9 1) provide a \$1.3 million non-reversionary Settlement Fund;
- 10 2) for valid claims submitted with a Proof of Purchase, provide up to \$1.00 per Product  
11 purchased during the Class Period, subject to *pro rata* adjustments, without any limitation  
12 on the number of Products purchased;
- 13 3) for valid claims submitted without a Proof of Purchase, provide up to \$1.00 per Product  
14 purchased during the Class Period, subject to *pro rata* adjustments, for up to ten  
15 Products purchased;
- 16 4) provide injunctive relief by removing the allegedly misleading “non-toxic” claim from  
17 the Windex Product packaging within ninety (90) days after the Effective Date;
- 18 5) promulgate notice to the Settlement Class, which reached an estimated 70% of Settlement  
19 Class Members, including through a social media campaign on Facebook and Instagram  
20 targeting “those who have liked or followed Windex and SC Johnson pages, adults 35  
21 years and older with an interest in cleaning, and people who have listed their job title as  
22 cleaner, housekeeper and similar” with over 78 million impressions, a nationwide press  
23 release, print publication in *The Alameda Sun* once a week for 4 weeks, a dedicated  
24 settlement website, and a 24-hour toll-free Interactive Voice Response (“IVR”) telephone  
25 line; and  
26

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27  
28 <sup>1</sup> Capitalized terms not defined herein are defined in the April 19, 2021, Amended Settlement Agreement of Class Action Claims (“Settlement Agreement” or “Amended Settlement Agreement”). See Declaration of Ronald A. Marron filed concurrently herewith (“Marron Decl.”), Ex. 1.

1           6) pay Class Counsel’s attorneys’ fees and expenses in an amount up to 33% of the  
2           Settlement Fund, as awarded by the Court, and an incentive payment to Plaintiff Clark up  
3           to \$2,500, as awarded by the Court.

4   *See* Marron Decl., Ex. 1, ¶¶ 2.33, 4.2(k)(i)-(ii), 4.4(a), 4.5, 8.1, and 8.3; Declaration of Jeanne C. Finegan  
5   filed concurrently herewith (“Finegan Decl.”), ¶¶ 1-19.

6           This is an excellent recovery for the Settlement Class. The Settlement emerged only after  
7   extensive arm’s-length negotiations, including a mediation session with the Honorable Jay C. Gandhi  
8   (Ret.) of JAMS ADR, and three months of post-mediation negotiations. Marron Decl., ¶ 5. Instead of  
9   risking the class’ recovery with further litigation, the Settlement provides certainty, finality, and a  
10   significant monetary recovery and valuable injunctive relief. Continued litigation poses significant risks  
11   to class recovery.

12           In its July 9, 2021 Preliminary Approval Order, this Court found that the Settlement fell within  
13   the range of possible approval, and preliminarily concluded that it was fair, reasonable, and adequate, so  
14   as to warrant submission to members of the Settlement Class for their consideration. The Court  
15   conditionally certified a Settlement Class and set a deadline of October 29, 2021 for the submission of  
16   claim forms and requests for exclusion and established a hearing date of December 7, 2021 for final  
17   approval of the Settlement.

18           In conformity with the Preliminary Approval Order, Kroll Settlement Administration (“Kroll”)  
19   published a social media campaign on Facebook and Instagram to target purchasers of Windex products  
20   with over 78 million impressions. Finegan Decl., ¶¶ 13-16. On July 30, 2021, Kroll issued a press release  
21   over PR Newswire’s US1 Newslines that resulted in approximately 110 news mentions of the Settlement.  
22   Finegan Decl., ¶ 17 & Ex. C. Kroll also published notice in *The Alameda Sun* once a week for four weeks  
23   on August 5, 2021, August 12, 2021, August 19, 2021 and August 26, 2021 in compliance with the  
24   Consumers Legal Remedies Act (“CLRA”). Finegan Decl., ¶¶ 10-12 & Ex. A. Additionally, Kroll created  
25   a dedicated settlement website, and a 24-hour toll-free IVR telephone line. Finegan Decl., ¶¶ 18-19.  
26   Kroll estimates that these forms of notice reached “70% of Settlement Class Members nationwide, on  
27   average 1.9 times, through publication media notice through print, online display, search, social media  
28   and a press release with cross-device targeting on desktop and mobile.” Finegan Decl., ¶ 4. As of this



1 writing, approximately 124,915 Settlement Class Members have submitted claims and only 12 class  
2 members have requested to be excluded from the Settlement Class. Finegan Decl., ¶ 20-21.

3 The Settlement compensates Settlement Class Members for their alleged overpayment due to the  
4 Products’ “non-toxic” labeling claims and it achieves the removal of those challenged claims from  
5 Product packaging. It is a tremendous victory for consumers that enjoys strong support from the members  
6 of the Settlement Class. The Court should grant final approval and enter the Final Approval Order and  
7 Judgment that has been lodged with the Court herewith.

8 **II. FACTUAL AND PROCEDURAL BACKGROUND**

9 Defendant sells a variety of cleaning products under the Windex brand labeled as being “non-  
10 toxic,” including Windex Original Non-Toxic Formula, Windex Vinegar Non-Toxic Formula, Windex  
11 Ammonia-Free Non-Toxic Formula, and Windex Multi-Surface Non-Toxic Formula (the “Products” or  
12 “Windex Products”). Compl., ¶ 1. Plaintiff alleges that Defendant’s “non-toxic” representations are false  
13 and misleading because “[e]ach of the Windex Products contain several ingredients that each, taken  
14 alone, constitutes a toxic ingredient that belies the ‘non-toxic’ claim.” *Id.*, ¶ 5. Plaintiff’s complaint  
15 details the toxic ingredients in the Windex Products that render the non-toxic claims to be false and  
16 misleading. *Id.*, ¶¶ 24-36. Plaintiff Clark purchased Windex Products, including the “non-toxic”  
17 ammonia-free variety from a Safeway store located in San Francisco in the spring of 2020. *Id.*, ¶ 12.  
18 Plaintiff’s complaint brings causes of action on behalf of a nationwide class and a California class for  
19 breach of express and implied warranty, for violations of the California Consumers Legal Remedies Act  
20 (“CLRA”) (Cal. Civ. Code §§ 1750, *et seq.*), for violations of California’s Unfair Competition Law  
21 (“UCL”) (Cal. Bus. & Prof. Code §§ 17200, *et seq.*), for violations of California’s False Advertising Law  
22 (“FAL”) (Cal. Bus. & Prof. Code §§ 17500, *et seq.*), and for fraud and negligent misrepresentation.  
23 Compl., ¶¶ 6, 46-47, 60-159.

24 Following the filing of the complaint, the Parties initiated discussions about the prospect of  
25 opening settlement talks to resolve the litigation, and since that date, the Parties have had a series of  
26 negotiations about terms of a settlement. Marron Decl., ¶ 4. Ultimately, the Parties agreed to proceed  
27 with further settlement negotiations before a qualified mediator. *Id.* Prior to the mediation, S.C. Johnson  
28 produced certain informal discovery and information regarding the Windex Products, including relevant

1 sales data, so that Plaintiff’s Counsel could evaluate its position with respect to any potential class action  
2 settlement. *Id.* In addition, before and after filing the initial complaint, Plaintiff’s Counsel conducted  
3 extensive research into the claims made in this case and the substantiation therefor. *Id.*

4 On September 8, 2020, the Parties participated in a mediation session before the Honorable Jay  
5 C. Gandhi (United States Magistrate Judge, Ret.) of JAMS ADR. Marron Decl., ¶ 5. During mediation,  
6 the Parties reached an agreement in principal to resolve the matter. *Id.* Following the mediation session,  
7 the Parties engaged in additional settlement negotiations in the ensuing months to detail the terms of the  
8 proposed class action settlement agreement. *Id.* On December 2, 2020, the Parties finalized and signed  
9 the class action Settlement Agreement. On February 17, 2021, the Court denied Plaintiff’s original  
10 motion for preliminary approval of class action settlement. *See* February 17, 2021 Order. Following the  
11 denial of the original preliminary approval motion, the Parties negotiated an Amended Settlement  
12 Agreement that was presented to the Court for preliminary approval. On July 9, 2021, this Court granted  
13 preliminary approval of the Settlement. The Court found that “[t]he amount of the proposed settlement  
14 is within the range of reasonableness given the case law concerning damages in a labeling case, and the  
15 injunction is a significant victory; it is meaningful and valuable to the putative class.” July 9, 2021 Order  
16 at 5.

17 **III. THE TERMS OF THE SETTLEMENT**

18 **A. Certification of a Settlement Class**

19 The Parties have stipulated to the certification of a Settlement Class for settlement purposes only,  
20 defined as “all persons that, during the Class Period, both resided in the United States and purchased in  
21 the United States any Product for personal and household use and not for resale.” Marron Decl., Ex. 1  
22 ¶ 2.31.<sup>2</sup> The “Class Period” is defined as “the time period from the date when SC Johnson initially  
23 labeled the Products as non-toxic to the date of Preliminary Approval of the Settlement” (Marron Decl.,  
24 Ex. 1 ¶ 2.9) and the “Products” are defined as “all Windex products with a ‘non-toxic formula’ label,  
25 including: Windex Original, Windex Vinegar, Windex Ammonia-Free, and Windex Multi- Surface.”  
26

27 <sup>2</sup> Excluded from the Settlement Class are: “(a) SC Johnson’s board members or executive-level officers,  
28 including its attorneys; (b) governmental entities; (c) the Court, the Court’s immediate family, and the  
Court’s staff; and (d) any person who timely and properly excludes himself or herself from the Settlement  
Class in accordance with the procedures approved by the Court.” Marron Decl., Ex. 1 ¶ 2.31.

1 Marron Decl., Ex. 1 ¶ 2.21.

2 **B. Monetary and Injunctive Relief**

3 As noted above, the Settlement affords both significant monetary and injunctive relief to the  
4 Settlement Class:

5 1. \$1.3 Million in Monetary Relief. The Settlement establishes a \$1.3 million Settlement Fund  
6 that will be used to pay Claimants who submit valid and timely Claim Forms. Marron Decl., Ex. 1 ¶ 2.33.  
7 The Settlement Fund will also be used to pay for any award of attorneys’ fees and expenses that the  
8 Court orders, any class notice and administration costs, and a service award to the named Plaintiff.  
9 Marron Decl., Ex. 1 ¶ 2.33. Claimants who file a valid Claim Form for purchases of the Products with  
10 Proof of Purchase<sup>3</sup> may obtain reimbursement of up to \$1.00 per Product purchased during the Class  
11 Period, without any limitation on the number of Products purchased. Marron Decl., Ex. 1 ¶ 4.2(k)(i).  
12 Claimants who file a valid Claim Form for purchases of Products without Proof of Purchase may obtain  
13 reimbursement of up to \$1.00 per Product purchased for up to ten Products purchased during the Class  
14 Period. Marron Decl., Ex. 1 ¶ 4.2(k)(ii). Claimants seeking reimbursement without Proof of Purchase  
15 must state under penalty of perjury the type(s) and number of Products purchased and the approximate  
16 date(s) of purchases. Marron Decl., Ex. 1 ¶ 4.2(k)(ii). If there is a Residual Fund, then payment to  
17 Claimants who submitted Claim Forms that were determined by the Settlement Administrator to be valid,  
18 timely and approved shall be increased on a *pro rata* basis of the eligible Claimant’s Initial Claim  
19 Amount. Marron Decl., Ex. 1 ¶ 4.4(a). If the total amount of the timely, valid, and approved claims  
20 submitted by Claimants exceeds the funds available, considering any fees, payments, and costs set forth  
21 in the Agreement that must also be paid from the Settlement Fund, each eligible Claimant’s Initial Claim  
22 Amount shall be proportionately reduced on a *pro rata* basis, such that the aggregate value of the cash  
23 payments distributed does not exceed the Settlement Fund balance after payment of all other costs.  
24 Marron Decl., Ex. 1 ¶ 4.4(b).

25 2. Injunctive Relief. S.C. Johnson has agreed to provide the following injunctive relief:  
26 “Beginning within ninety (90) days after the Effective Date, SC Johnson shall begin manufacturing  
27 Products without the allegedly misleading ‘non-toxic’ claim on the Product labels. Within ten (10) days  
28 \_\_\_\_\_

<sup>3</sup> “Proof of Purchase” is defined in paragraph 2.22 of the Settlement Agreement.

1 of the Effective Date, SC Johnson will modify the content of SC Johnson’s Website(s) to correspond to  
2 the labeling changes.” Marron Decl., Ex. 1 ¶ 4.5.

3 3. Payment of Attorneys’ Fees. Pursuant to the Settlement Agreement, Class Counsel may  
4 petition the Court for attorneys’ fees and expenses in an amount not to exceed 33% of the Settlement  
5 Fund. Marron Decl., Ex. 1 ¶ 8.1. The reasonableness of Plaintiff’s fee request is discussed in the  
6 concurrently filed Motion for Attorneys’ Fees, Costs, and Incentive Award.

7 4. Payment of Service Award. Class Counsel may also petition the Court for a Service Award to  
8 named Plaintiff, Howard Clark, in the amount of \$2,500. Marron Decl., Ex. 1 ¶ 8.3.

9 **C. Release**

10 The Released Claims are defined in paragraph 2.24 of the Settlement Agreement and include  
11 “only those claims that arise out of or relate to the allegations in the Action or Defendant’s advertising,  
12 formulation, labeling, marketing, and advertising of the Products.” Marron Decl., Ex. 1 ¶ 2.24. The  
13 Released Claims do not include “any claim for damages sought for any type of personal injury regardless  
14 of legal theory or the law under which such action may be brought.” Marron Decl., Ex. 1 ¶ 2.24. The  
15 Released Persons are defined in paragraph 2.25 of the Settlement Agreement. Marron Decl., Ex. 1 ¶ 2.25.

16 **IV. CLAIMS RATE, OPT-OUTS, AND OBJECTIONS**

17 In accordance with the Court’s Preliminary Approval Order, the deadline for class members to  
18 submit claim forms and requests for exclusion was on October 29, 2021. *See* July 9, 2021 Order at 6. To  
19 date, approximately 124,915 class members have submitted claims. Finegan Decl., ¶ 20. 124,433 class  
20 members submitted claims through the settlement website and 472 class members submitted claims by  
21 mail. *Id.* Out of the total claims received, 123,410 class members submitted claims without Proof of  
22 Purchase and 1,505 class members submitted claims with Proof of Purchase. *Id.* Under the terms of the  
23 Settlement, class members who submitted claims without Proof of Purchase may obtain reimbursement  
24 of up to \$1.00 per Product purchased for up to ten Products purchased during the Class Period, subject  
25 to *pro rata* adjustments. Marron Decl., Ex. 1 ¶ 4.2(k)(ii). Class members who submitted claims with  
26 Proof of Purchase may obtain reimbursement of up to \$1.00 per Product purchased during the Class  
27 Period, without any limitation on the number of Products purchased, subject to *pro rata* adjustments.  
28 Marron Decl., Ex. 1 ¶ 4.2(k)(i). Here, the average number of product claims submitted per class member

1 without Proof of Purchase was for 8.42 products purchased and there are approximately 1,039,387 per  
2 product claims for class members without Proof of Purchase. Finegan Decl., ¶ 20. For class members  
3 who submitted claims with Proof of Purchase, the average number of products claimed was 42.41 and  
4 there are approximately 63,826 per product claims. *Id.* Given the number of claims submitted, there will  
5 be a downward *pro rata* adjustment.

6 Once notice expenses, attorneys' fees, costs, and the incentive award are deducted from the \$1.3  
7 million Settlement Fund, Plaintiff expects there will be approximately \$508,111.35 available for  
8 distribution to class members who submitted valid and timely claims.<sup>4</sup> Because there are approximately  
9 1,103,213 total products claimed by class members (Finegan Decl., ¶ 20), each Claimant will receive  
10 approximately \$.46 cents per product purchased. The average number of products claimed per class  
11 member without a Proof of Purchase is 8.42 products (*Id.*) and therefore the average class member who  
12 submits a claim without a Proof of Purchase will receive \$3.87 from the Settlement Fund. The average  
13 number of products claimed per class member with a Proof of Purchase is 42.41 products (*Id.*) and  
14 therefore the average class member who submits a claim with a Proof of Purchase will receive \$19.50  
15 from the Settlement Fund.

16 The reaction to the Settlement was overwhelmingly positive. The Settlement Website received  
17 293,283 visits and 880 calls were made to the IVR toll free number. Finegan Decl., ¶¶ 18-19. In  
18 comparison to the thousands of class members who submitted timely and valid claims, only 12 requests  
19 for exclusion were submitted. Finegan Decl., ¶ 21. The deadline for class members to submit objections  
20 to the settlement is set for November 12, 2021. *See* July 9, 2021 Order at 6. As of the date of this filing,  
21 zero objections have been received. Finegan Decl., ¶ 21.

22 **V. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT**

23 **A. The Applicable Legal Standards**

24 A class action settlement requires court approval after notice to the class members. *Cellphone*  
25 *Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1390 (citing Cal. R. Ct., Rule 3.769); *see also*  
26

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27 <sup>4</sup> Plaintiff estimates that the following deductions will be made from the Settlement Fund, subject to  
28 Court approval: (1) \$429,000 in attorneys' fees and expenses paid to Class Counsel, subject to Court  
approval; (2) \$2,500 as a service award to Plaintiff Howard Clark, subject to Court approval; and  
(3) approximately \$360,388.65 in notice and administration costs. Finegan Decl., ¶ 22.

1 Fed. R. Civ. P. 23(e).<sup>5</sup> California has a well-established and strong policy in favor of the settlement of  
2 litigation. *Stambaugh v. Superior Court* (1976) 62 Cal. App. 3d 231, 236; *Hamilton v. Oakland Sch. Dist.*  
3 (1933) 219 Cal. 322, 329; *Cent. & W. Basin Water Replenishment Dist. v. S. Cal. Water Co.* (2003) 109  
4 Cal. App. 4th 891, 912. Settlement is particularly favored in class actions, given the costs and  
5 uncertainties inherent in complex litigation. See *7-Eleven Owners for Fair Franchising v. Southland*  
6 *Corp.* (2000) 85 Cal. App. 4th 1135, 1152 (“the risks of maintaining class action status and pursuing  
7 judgment through trial would have been large”); *Bell v. Am. Title Ins. Co.* (1991) 226 Cal. App. 3d 1589,  
8 1607 (noting California’s “strong public policy in favor of settlement of class actions”); *Class Plaintiffs*  
9 *v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276, cert. denied, 506 U.S. 953 (1992) (“strong judicial  
10 policy ... favors settlements, particularly where complex class action litigation is concerned”);  
11 Rubenstein, 4 Newberg on Class Actions (5th ed. 2013) § 13.44 (“The law favors settlement, particularly  
12 in class actions and other complex cases where substantial resources can be conserved by avoiding  
13 lengthy trials and appeals.”).

14 Whether a class action settlement should receive final approval is committed to the broad  
15 discretion of the trial court. *Mallick v. Superior Court* (1979) 89 Cal. App. 3d 434, 438 (“the trial court  
16 has broad powers to determine whether a proposed settlement in a class action is fair”). The purpose of  
17 the final approval hearing is not, however, to rework a settlement that is the result of complex and hard-  
18 fought negotiations. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 246 (“The proposed  
19 settlement is not to be judged against a hypothetical or speculative measure of what might have been  
20 achieved had plaintiffs prevailed at trial.”).

21 When the settlement results from arm’s-length bargaining by experienced counsel who  
22 performed sufficient discovery, and the percentage of objectors is small, there is a “presumption of  
23 fairness.” *Dunk v. Ford Motor Company* (1996) 48 Cal. App. 4th 1794, 1802. That presumption was  
24 summarized as follows by the First District Court of Appeal in *In re Microsoft I-V Cases* (2006) 135 Cal.  
25 App. 4th 706, 723 (internal citations omitted):  
26

27 \_\_\_\_\_  
28 <sup>5</sup> In resolving issues relating to class actions, California courts frequently look to Rule 23 of the Federal  
Rules of Civil Procedure, and to federal cases decided thereunder, for guidance. *Green v. Obledo* (1981)  
29 Cal. 3d 126, 146; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 821.

1 [T]he trial court should give “[d]ue regard ... to what is otherwise a private consensual  
2 agreement between the parties.” Such regard limits its inquiry “to the extent necessary to  
3 reach a reasoned judgment that the agreement is not the product of fraud or overreaching  
4 by, or collusion between, the negotiating parties, and that the settlement, taken as a whole,  
5 is fair, reasonable and adequate to all concerned.” The trial court operates under a  
6 presumption of fairness when the settlement is the result of arm’s-length negotiation,  
7 investigation and discovery that are sufficient to permit counsel and the court to act  
8 intelligently, counsel are experienced in similar litigation, and the percentage of objectors  
9 is small.

10 While “California courts have recognized that ‘class action settlements should be scrutinized  
11 more carefully if there has been no adversary certification,’ these concerns are satisfied by a careful  
12 fairness review of the settlement by the trial court . . . [and] pre-certification settlements are routinely  
13 approved if found to be fair and reasonable.” *Wershba*, 91 Cal.App.4th at 240 (quoting *Dunk*, 48 Cal.  
14 App. 4th at 1803, n.9). On final approval, a number of factors may be relevant to a determination that a  
15 settlement is “fair, adequate, and reasonable,” including:

16 [T]he strength of plaintiffs’ case, the risk, expense, complexity and likely duration of  
17 further litigation, ... the amount offered in settlement, the extent of discovery completed  
18 and the stage of the proceedings, the experience and views of counsel, ... and the reaction  
19 of the class members to the proposed settlement.

20 *Dunk*, 48 Cal. App. 4th at 1801. As explained below, the Settlement Agreement before the Court amply  
21 satisfies these standards.

22 **B. The Settlement Is Entitled to a Presumption of Fairness Because It Was Negotiated  
23 by Experienced Counsel with the Assistance of a Well-Respected Mediator**

24 As noted in *Microsoft I-V*, proposed class action settlements are presumed fair where the  
25 settlement is the result of arm’s-length negotiation, discovery has been sufficient, counsel are  
26 experienced in similar litigation, and the percentage of objectors is small. 135 Cal. App. 4th at 723; *see*  
27 *also Cellphone Termination Fee Cases*, 186 Cal. App. 4th at 1389. Each of those criteria is met here.  
28 Further, there is an absence of any markers of collusion or improper influence. *See, e.g., Jones v. Bath  
& Body Works, Inc.* (C.D. Cal. July 11, 2016) 2016 U.S. Dist. LEXIS 89681, at \*20 (no signs of collusion  
where settlement included monetary relief to class, fees would be awarded from a common fund, counsel  
had not sought a disproportionate distribution of settlement, and no funds would revert to defendant).  
Therefore, when the Court reviews the Settlement, it should begin with a presumption that the Settlement  
is fair, adequate, and reasonable.

1 Here, the Settlement was the result of arm’s-length negotiations under the aegis of a distinguished  
2 and experienced mediator, the Honorable Jay C. Gandhi (Ret.) of JAMS ADR. Marron Decl., ¶ 5. Prior  
3 to the mediation, S.C. Johnson produced certain informal discovery and information regarding the  
4 Windex Products, including relevant sales data, so that Plaintiff’s Counsel could evaluate its position  
5 with respect to any potential class action settlement. Marron Decl., ¶ 4. In addition, before and after the  
6 filing of the initial complaint, Plaintiff’s Counsel conducted extensive research into the claims made in  
7 this case and the factual and legal bases for the allegations. *Id.* Following the mediation session, the  
8 Parties engaged in additional settlement negotiations in the ensuing months to detail the terms of the  
9 class action Settlement Agreement. *Id.* Accordingly, the Settlement is the product of serious arm’s-length,  
10 non-collusive, negotiations and is entitled to a presumption of fairness.

11 **C. The Settlement Provides Significant Monetary and Injunctive Relief**

12 The proposed Settlement has no “obvious deficiencies” and is well within the range of approval.  
13 The Settlement establishes a \$1.3 million Settlement Fund. Damages in this case would not be based on  
14 a full refund of the purchase price, but rather the “price premium” that is associated with the non-toxic  
15 labeling claims. *See Hadley v. Kellogg Sales Co.* (N.D. Cal. 2018) 324 F. Supp. 3d 1084, 1104 (“It is  
16 well-established that the “price premium” attributable to’ an alleged misrepresentation on product  
17 labeling or packaging is a valid measure of damages in a mislabeling case under the FAL, CLRA, and  
18 UCL.”); *Werdebaugh v. Blue Diamond Growers* (N.D. Cal. May 23, 2014) 2014 WL 2191901, at \*22  
19 (“The proper measure of restitution in a mislabeling case is the amount necessary to compensate the  
20 purchaser for the difference between a product as labeled and the product as received.”). SC Johnson  
21 began using the “non-toxic” labels in January of 2019. *See* Declaration of Kelly Condon filed in Support  
22 of Motion for Preliminary Approval (“Condon Decl.”), ¶ 4. Plaintiff’s economics expert, Dr. Alan  
23 Goedde opines that it “would be appropriate to determine SC Johnson’s gains from its alleged  
24 misrepresentations by examining sales of the identified products before and after SC Johnson placed the  
25 alleged misrepresentations on Product labeling as it would control for factors affecting the price of the  
26 Products such as brand loyalty.” *See* Declaration of Dr. Alan G. Goedde filed in Support of Plaintiff’s  
27 Motion for Preliminary Approval on April 19, 2021 (“Goedde Decl.”), ¶ 7. This type of analysis has been  
28 accepted by other courts. For example, the court in *Brazil v. Dole Packaged Foods, LLC*, explained:



1 Dr. Capps' regression would control for other factors (such as price, seasonality, and  
2 regional differences) that could explain changes in Dole's sales figures that may otherwise  
3 erroneously be attributed to Dole's label statements. Moreover, **the Regression Model  
4 compares data on identical Dole products—the product before the label statement  
5 was introduced, and the same product after its label included the alleged  
6 misrepresentation....** [T]he regression model here contemplates factors other than the  
7 alleged misbranding that might influence market price, including 'expenditures associated  
8 with the advertising and promotion' of the products at issue, prices of complementary  
9 products, disposable personal income of consumers, and population.

10 (N.D. Cal. May 30, 2014) 2014 WL 2466559, at \*19 (emphasis added).

11 Dr. Goedde conducted an analysis similar to the type performed in *Brazil*. Dr. Goedde opines that  
12 "a review of average selling prices in 2018 and 2019 demonstrates that the sales prices of the Windex  
13 Products did not increase significantly, and, in fact, increased by less than the rate of inflation." Goedde  
14 Decl., ¶ 17. "The total number of Windex Products sold increased by only █% from 2018 to 2019 on  
15 a units basis." Goedde Decl., ¶ 11. This increase is not likely due to the addition of the "Non-Toxic"  
16 label claims, but rather because "[a]lmost the entire 2019 increase can be explained by a fundamental  
17 driver of sales of household cleaning products: the number of households in the United States. Data from  
18 the US Census Bureau indicates that the count of total households increased by 0.78% in 2019,  
19 corresponding almost exactly with the increase in quantity sold of the Windex Products." Goedde Decl.,  
20 ¶ 15. With respect to sales revenue, "comparison of the periods before and after the labeling change  
21 shows that Defendant was able to achieve only a modest increase in total sales revenue of █%."  
22 Goedde Decl., ¶¶ 23, 27. "Because sales revenue from the Windex Products increased in 2019 by less  
23 than would be expected based on reasonable benchmarks, it would be extremely challenging for the  
24 Plaintiff Class to demonstrate any effect in the marketplace stemming from the accused product labels.  
25 As a corollary, (and noting that Windex Product revenues increased by only \$ █ in 2019) it is  
26 likely that the proposed \$1.3 million settlement will effectively disgorge from Defendant any and all  
27 benefit Defendant is likely to have obtained as a result of the accused product label." Goedde Decl., ¶ 27.

28 Even if the sales increase of the Product were attributable to the "non-toxic" label claims, then  
damages in this action would be approximately \$ █ (Defendant's increased sales revenue).  
Goedde Decl., ¶ 27. Here, the \$1.3 million Settlement Fund accounts for approximately █% of total

1 damages that would be recoverable at trial and the \$508,111.35<sup>6</sup> expected to be distributed to Settlement  
2 Class Members represents approximately █% of potential recovery. This is well within the range of  
3 settlement approval.<sup>7</sup>

4 The Court should also find that the amount of recovery per class member is fair, reasonable, and  
5 adequate. Given the number of claims submitted, each Claimant will receive approximately \$.46 cents  
6 per Product purchased. This per Product recovery is slightly lower than the \$.54 cents per Product that  
7 Plaintiff estimated at the preliminary approval stage. *See* April 19 ,2021 Mem. in Support of Renewed  
8 Mot. for Preliminary Approval at 3. Because the average number of Products claimed per class member  
9 without Proof of Purchase is 8.42 Products (Finegan Decl., ¶ 20)., the average class member without  
10 proof of purchase will receive \$3.87 from the Settlement Fund. The average number of products claimed  
11 per class member with a Proof of Purchase is 42.41 products (*Id.*) and therefore the average class member  
12 who submits a claim with a Proof of Purchase will receive \$19.50 from the Settlement Fund. This is an  
13 excellent recovery for the class considering that Windex Products typically sell for less than \$4.00 per  
14 Product and only a percentage of that price can be associated with the non-toxic labeling claims. Goedde  
15 Decl., ¶¶ 6, 17-22. *See Lambert v. Nutraceutical Corp.* (9th Cir. 2017) 870 F.3d 1170, 1183, *overruled*  
16 *on other grounds* (“California law ‘requires only that some reasonable basis of computation of damages  
17 be used, and the damages may be computed even if the result reached is an approximation.’” (quoting  
18 *Pulaski & Middleman, LLC v. Google, Inc.* (9th Cir. 2015) 802 F.3d 979, 989)).

19 In addition to the monetary relief, the Settlement provides for valuable injunctive relief fully  
20 addressing the conduct at issue. As noted above, S.C. Johnson has agreed to refrain from advertising the  
21 Products with any “non-toxic” claims, including on the Products’ label and SC Johnson’s Website.  
22 Marron Decl., Ex. 1 ¶ 4.5. It is undeniable that the goal of this litigation, to seek corrective action and  
23

24 <sup>6</sup> *See supra*, n.4 (estimating notice expenses, attorneys’ fees, costs, and the incentive award to be  
deducted from the \$1.3 million Settlement Fund, subject to Court approval).

25 <sup>7</sup> *See Stovall-Gusman v. W.W. Granger, Inc.*, (N.D. Cal. June 17, 2015) 2015 WL 3776765, at \*4 (granting  
26 final approval of a net settlement amount representing 7.3% of the plaintiffs’ potential recovery at trial);  
27 *Balderas v. MassageEnvy Franchising, LLC*, (N.D. Cal. July 21, 2014) 2014 WL 3610945, at \*5  
(granting preliminary approval of a net settlement amount representing 5% of the projected maximum  
28 recovery at trial); *Ma v. Covidien Holding, Inc.*, (C.D. Cal. Jan. 31, 2014) 2014 WL 360196, at \*5  
(finding a settlement worth 9.1% of the total value of the action “within the range of reasonableness”);  
*Downey Surgical Clinic, Inc. v. Optuminsight, Inc.*, (C.D. Cal. May 16, 2016), 2016 WL 5938722, at \*5  
(granting final approval where recovery was as low as 3.21% of potential recovery at trial).

1 redress for the putative class, has been met. *See Littlejohn v. Copland* (9th Cir. 2020) 819 F. App'x 491,  
2 493 (affirming settlement where modification of packaging addressed very claims raised in complaint  
3 and class members “would derive value from the Settlement’s injunctive relief upon each future purchase  
4 of SweeTARTS”); *Fitzhenry-Russell v. Coca-Cola Co.* (N.D. Cal. Oct. 3, 2019) 2019 U.S. Dist. LEXIS  
5 232216, at \*18 (“It is appropriate for the Court to consider the injunctive relief in assessing the benefit  
6 to the class. . . . even if some of the value goes to the general public.”).<sup>8</sup>

7 There is a substantial risk to the class if this action was not settled. Plaintiff may not prevail at  
8 trial or obtain restitution or injunctive relief for class members; thereby ensuring no potential for  
9 monetary recovery or corrective action on behalf of consumers. Marron Decl. ¶ 7. This Settlement  
10 alleviates such risks. *See Curtis-Bauer v. Morgan Stanley & Co., Inc.* (N.D. Cal. Oct. 22, 2008), 2008  
11 WL 4667090, at \*4 (“Settlement avoids the complexity, delay, risk and expense of continuing with the  
12 litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.”). Not only  
13 might it be “exceptionally difficult” to prove damages at trial based on the “non-toxic” labeling, as this  
14 Court noted in granting preliminary approval (July 9, 2021 Order at 3), but proving Plaintiff’s claims  
15 will also require significant witness testimony, including multiple experts, and other evidence, along  
16 with a risk that the trier of fact will find the “non-toxic” claim to have been reasonable and not misleading  
17 under the circumstances. *See id.* at 4; *see also, e.g., Rivera v. S.C. Johnson & Son, Inc.*, (S.D.N.Y. Sept.  
18 24, 2021), 2021 U.S. Dist. LEXIS 183759, at \*11, 13 (granting motion to dismiss claims based on “non-  
19 toxic” labeling of Windex Products; observing “toxic” is susceptible of multiple definitions and  
20 interpretations by consumers, rejecting allegations that toxic ingredients are present in sufficient  
21 concentration to cause harm). The significant risks involved in proving damages at trial, balanced against  
22 the substantial monetary benefit readily available to class members through the Settlement Fund, weighs  
23 heavily in favor of the Settlement.

#### 24 **D. Risk of Continuing Litigation**

25 As referenced above, proceeding in this litigation in the absence of settlement poses various risks  
26

27  
28 <sup>8</sup> Moreover, although these marketing changes have significant value for the class and the public, Class Counsel seek a fee award based on a percentage of value of the monetary component only. *See* Mem. in Support of Mot. For Attorneys’ Fees, Costs, and Incentive Award, filed concurrently herewith.

1 such as failing to certify a class, having summary judgment granted against Plaintiff, or losing at trial.  
2 Such considerations have been found to weigh heavily in favor of settlement. *See Rodriguez v. West*  
3 *Publ'g Corp.* (9th Cir. 2009) 563 F.3d 948, 966. Even if Plaintiff is able to certify a class, there is also a  
4 risk that the Court could later decertify the class action. *See In re Netflix Privacy Litig.* (N.D. Cal. Mar.  
5 18, 2013) 2013 WL 1120801, at \*6 (“The notion that a [trial] court could decertify a class at any time is  
6 one that weighs in favor of settlement.”) (internal citations omitted). The Settlement eliminates these  
7 risks by ensuring Settlement Class Members a recovery that is “certain and immediate, eliminating the  
8 risk that Class members would be left without any recovery ... at all.” *Fulford v. Logitech, Inc.* (N.D.  
9 Cal. Mar. 5, 2010) 2010 U.S. Dist. LEXIS 29042, at \*8.

#### 10 **E. The Extent of Discovery and Status of Proceedings**

11 Under this factor, courts evaluate whether class counsel had sufficient information to make an  
12 informed decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.* (9th Cir. 2000) 213  
13 F.3d 454, 459. “[I]n the context of class action settlements, ‘formal discovery is not a necessary ticket to  
14 the bargaining table’ where the parties have sufficient information to make an informed decision about  
15 settlement.” *Id.* This is especially true “where there has been sufficient information sharing and  
16 cooperation in providing access to necessary data[.]” *Misra v. Decision One Mortg. Co.* (C.D. Cal. Apr.  
17 13, 2009) 2009 WL 4581276, at \*8; *see also Taifa v. Bayh* (N.D. Ind. 1994) 846 F. Supp. 723, 728-29  
18 (same). Here, the Parties have engaged in informal discovery and have exchanged mediation briefs  
19 setting forth their respective legal arguments. Marron Decl. ¶¶ 4-7. Plaintiff’s Counsel have been  
20 provided with sufficient information to make an informed decision about the terms of the Settlement,  
21 including Defendant’s financial information concerning sales of the Windex Products. Marron Decl. ¶ 8.  
22 Moreover, Plaintiff’s Counsel conducted extensive research into the claims made in this case and the  
23 substantiation for such claims. Marron Decl., ¶ 4.

#### 24 **F. Experienced Class Counsel Recommend Approval of the Settlement**

25 The Settlement is also fully supported and recommended by experienced Class Counsel, who  
26 have vigorously prosecuted the case here. Class Counsel have carefully gauged the risks involved with  
27 this case and are in the best position to evaluate those risks at this stage of the litigation. *See 7-Eleven,*  
28 85 Cal. App. 4th at 1152; *Lyons v. Marrud, Inc.* (S.D.N.Y. June 6, 1972) 1972 WL 327, at \*2

1 (“Experienced and competent counsel have assessed these problems and the probability of success on  
2 the merits ... and [t]he parties’ decisions regarding the respective merits of their positions has an  
3 important bearing on this case.”). “Counsels’ opinions warrant great weight both because of their  
4 considerable familiarity with this litigation and because of their extensive experience in similar actions.”  
5 *In re Washington Public Power Supply System Securities Litig.* (D. Ariz. 1989) 720 F. Supp. 1379, 1392  
6 aff’d, 955 F.2d 1268; *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 622 (“Attorneys, having  
7 an intimate familiarity with a lawsuit after spending years in litigation, are in the best position to evaluate  
8 the action, and the Court should not without good cause substitute its judgment for theirs.”). Here, Class  
9 Counsel has substantial experience in class action litigation. Marron Decl., ¶¶ 9-10, 29 & Ex. 2 [Firm  
10 Resume]. It is the opinion of Class Counsel that the consideration and terms set forth in the Settlement  
11 Agreement are fair, reasonable and adequate and in the best interest of the Settlement Class, in light of  
12 all known facts and circumstances, including the risk of significant delay, defenses asserted by  
13 Defendant, and the risk of no recovery. Marron Decl., ¶ 7. There is a substantial risk to the class if this  
14 action was not settled. Plaintiff may not prevail at trial or obtain restitution for class members; thereby  
15 ensuring no potential for monetary recovery on behalf of consumers. *Id.*

#### 16 **G. The Settlement Enjoys the Support of Class Members**

17 It is well established that “the absence of a large number of objections to a proposed class action  
18 settlement raises a strong presumption that the terms of a proposed class action settlement are favorable  
19 to the class members.” *National Rural Telecommunications Cooperative v. DIRECTV, Inc.* (C.D. Cal.  
20 2004) 221 F.R.D. 523, 529 (collecting cases). Here, the response from class members has been  
21 overwhelmingly positive.

22 Notice to the class was disseminated beginning on July 30, 2021. Finegan Decl., ¶ 3.  
23 Approximately 124,915 class members have submitted valid claims and only 12 requests for exclusion  
24 have been received. Finegan Decl., ¶ 20-21. Thus far, no objections have been submitted. Finegan Decl.,  
25 ¶ 21. If no objections, or only a small number of them, end up being filed, that will be a strong indication  
26 that the class overwhelmingly supports the Settlement and favors approval of it as fair. *See 7-Eleven*, 85  
27 Cal. App. 4th at 1153.

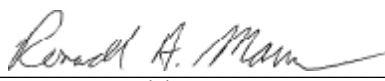
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**VI. CONCLUSION**

The Settlement in this matter is fair, adequate, and reasonable. Plaintiff therefore requests that this Court grant final approval and enter judgment on the forms submitted herewith.

Dated: November 8, 2021

**LAW OFFICES OF RONALD A. MARRON,  
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