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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN DIEGO – HALL OF JUSTICE**

15 CHRISTOPHER WEIGHT, an individual;  
16 on behalf of himself and all others similarly  
17 situated,

17 Plaintiff,

18 v.

19 THE ACTIVE NETWORK, INC., a  
20 Delaware corporation; and DOES 1-100,  
21 inclusive,

21 Defendants.

Case No. 37-2014-00004713-CU-AT-CTL

Assigned for All Purposes to:  
Judge Timothy Taylor  
Dept. C-72

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION FOR FINAL  
APPROVAL OF CLASS ACTION  
SETTLEMENT AND REQUEST FOR  
ATTORNEYS' FEES AND EXPENSES**

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1 Plaintiff Elena Boland submits this memorandum in support of final approval of the  
2 settlement with Defendant The Active Network, LLC (“Active” or “Defendant”).<sup>1</sup>

3 **I. Introduction**

4 Plaintiff seeks final approval of a proposed class action settlement with Active that  
5 provides a minimum of \$3.4 million in settlement benefits and potentially more than \$3.8  
6 million. On November 18, 2016, the Court preliminarily approved the settlement as fair,  
7 reasonable, and adequate.

8 The proposed settlement consists of a \$1.25 million non-reversionary Settlement Fund  
9 that will be used to pay Class Members full refunds of all Active Advantage membership fees  
10 (between \$59.95 and \$69.95 per year). Claimants will also receive an Enhanced Settlement  
11 Award of up to three times their refund amount. Counsel estimates that the average settlement  
12 payment will be around \$280.

13 In addition to the Settlement Fund, Active will donate free Advantage memberships  
14 totaling \$1.75 million. The free memberships will be given to under-privileged or under-  
15 resourced people in California. The free memberships will entitle the holder to all  
16 membership privileges.

17 This settlement also builds on the settlement Active reached with the California district  
18 attorneys of Alameda, San Diego and Sonoma counties, even though, for bureaucratic reasons,  
19 those offices were unable to coordinate settlement and notice efforts with this case. For  
20 example, consumers were entitled to refunds under the district attorney settlement, but the  
21 refunds were not multiplied. Under the settlement here, all claimants to the district attorneys  
22 settlement (who are also Class Members here) will receive the same refund enhancement as  
23 those submitting claims through this settlement. The class notice program also generated three  
24 times more claims than the district attorneys’ notice program.

25 Finally, Active will pay for class notice and settlement administration costs estimated  
26 to be no more than \$89,000, attorneys’ fees and expenses up to \$800,000, and the plaintiff

27 <sup>1</sup> Unless otherwise defined, all capitalized terms are defined and have the meaning  
28 specified in the Stipulation of Settlement attached as Exhibit A to the concurrently filed  
Declaration of Leslie E. Hurst (“Hurst Decl.”).

1 service award of \$750.

2 The class notice program approved by the Court was timely completed. *See*  
3 Declaration of Kenneth Jue (“Jue Decl.”), ¶¶3-5. Plaintiff accordingly requests that the Court  
4 grant final approval of the settlement, certify the settlement class, award fees and expenses in  
5 the amounts set forth above, and enter a final order and judgment.

## 6 **II. Background And Summary Of Litigation<sup>2</sup>**

### 7 **A. The Removals to Federal Court and Motion Practice**

8 This case began on February 24, 2014, when Christopher Weight filed a complaint  
9 against The Active Network, Inc. alleging that Active deceptively enrolled users of its event  
10 registration website into its Active Advantage membership program. Register of Actions  
11 (“ROA”) #1; Hurst Decl., ¶¶4-5.

12 Active aggressively litigated this case throughout, throwing in Plaintiff’s path a range  
13 of procedural hurdles designed to slow the case down and avoid examination of the  
14 allegations. Its defense began with removal to federal court. ROA #11. Plaintiff filed a  
15 motion to remand and a First Amended Complaint. Hurst Decl., ¶6. The district court  
16 remanded the action, finding there was no federal jurisdiction due to lack of diversity of  
17 citizenship. ROA #13; Hurst Decl., ¶6.

18 Next, Active filed a “Motion for a Determination That This Action Has No Merit”  
19 pursuant to Civil Code §1781(c)(3), which Plaintiff obviated by filing a Second Amended  
20 Complaint replacing Christopher Weight with Tara Mooney and Elena Boland as the named  
21 plaintiffs. ROA ##37-41, 52-54; Hurst Decl., ¶7. The Second Amended Complaint was filed  
22 on April 1, 2015. ROA #66.

23 Active responded by again removing the case to federal court. ROA #68. The district  
24 court again granted Plaintiff’s motion to remand. ROA #71. Because of these delays, Active  
25 did not answer the Second Amended Complaint until February 10, 2016 – two years after the  
26 case began. ROA #103; Hurst Decl., ¶8. Once back in state court, 170.6 challenges by both  
27

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28 <sup>2</sup> This motion is filed by Plaintiff. Active does not necessarily agree to the description of  
events and issues as stated herein.

1 parties resulted in cancellation of several hearings until the case arrived – and stayed – in this  
2 Department. ROA ##73, 78, 81-82. Meanwhile, on January 21, 2016, Blood Hurst &  
3 O’Reardon, LLP (“BHO”) joined as Plaintiff’s Counsel to assist in litigating against Active’s  
4 particularly aggressive litigation tactics. ROA #84; Hurst Decl., ¶9.

5 Once in this Department, while Plaintiff pushed for discovery, Active again attempted  
6 to derail the case with yet more baseless motion practice. This time it sought to disqualify *all*  
7 of Plaintiff’s Counsel. ROA ##108-109. It also sought to depose one of Plaintiff’s Counsel  
8 and a former named plaintiff, forcing Plaintiff to file a motion to quash. ROA #110; Hurst  
9 Decl., ¶17. This Court; however, demonstrated no patience for Active’s approach to litigation.  
10 It summarily denied Active’s motion to disqualify Plaintiff’s Counsel as “tactical abuse by the  
11 defense counsel” demonstrated by their efforts “to delay the case with their unsuccessful  
12 removals to federal court” and “to avoid the merits by increasing the costs for plaintiff.” ROA  
13 #128 at 3-4.

14 In spite of its unsuccessful pitch to disqualify Plaintiff’s Counsel, Active inexplicably  
15 refused to withdraw its deposition subpoena served on Plaintiff’s Counsel, Steven  
16 Marchbanks, and its deposition subpoena served on the former plaintiff, necessitating a  
17 hearing on Plaintiff’s motion to quash. Plaintiff’s motion to quash was granted. In its order,  
18 the Court wrote: “The deposition notices are evidence of a ‘scorched earth’ defense which  
19 defendant would be well advised to reconsider,” and had monetary sanctions been requested  
20 by Plaintiff, “they may well have been awarded.” ROA #158.

## 21 **B. The Discovery**

22 While fending off Active’s procedural challenges, Plaintiff Boland also started taking  
23 the discovery needed to build her case. On February 5, 2016, Plaintiff began serving Active  
24 with written discovery. Hurst Decl., ¶11. In total, Plaintiff served 44 form interrogatories, 39  
25 special interrogatories, 48 requests for production of documents and 4 requests for admission.  
26 Hurst Decl., ¶¶10, 12. This resulted in verified interrogatory responses and Active’s  
27 production of 112,206 documents. *Id.*, ¶12. Plaintiff’s Counsel reviewed the document  
28 production and, along with the other discovery responses, prepared for depositions and class

1 certification. *Id.*

2 Plaintiff also subpoenaed information from third party event organizers who had  
3 received consumer complaints regarding Active Advantage. Plaintiff obtained documents  
4 from The Color Run, LLC, World Triathlon Corp. and Sandy Feet Events, Inc., and deposed  
5 representatives from The Color Run and Sandy Feet Events. Hurst Decl., ¶13. Document  
6 subpoenas were also served on the Better Business Bureau of California, Yelp, Inc., Xcentric  
7 Ventures, LLC, and Active's merchant bank, Paymentech, LLC (n/k/a JPMorgan Chase). *Id.*  
8 Documents were obtained from the Better Business Bureau of California and Paymentech,  
9 after extensive meet and confers with Paymentech over the scope of the subpoena and its  
10 objections thereto, with meet and confers in process with the other subpoenaed parties. *Id.*

11 Prior to filing the complaint and through their investigation, Plaintiff's Counsel learned  
12 of a 2013 Iowa Attorney General investigation into the deceptive nature of the Active  
13 Advantage program. Hurst Decl., ¶14. In the spring of 2016, Plaintiff's Counsel learned of a  
14 similar 2014 investigation by Vermont's Attorney General. *Id.* Accordingly, Plaintiff sent  
15 public records requests to, and received documents from, the Iowa and Vermont Attorneys  
16 General. *Id.* In total, Plaintiff received and reviewed over 2,100 pages of documents from  
17 third parties. *Id.*, ¶¶13-14.

18 Plaintiff also sought information from Active regarding the two Attorney General  
19 investigations, as well as any other governmental investigations. *Id.*, ¶15. Active refused to  
20 provide any documents or information regarding any governmental investigations. *Id.* When  
21 asked point blank if there were any governmental investigations in addition to those conducted  
22 in Iowa and Vermont, Active refused to say, asserting such information was not relevant even  
23 though at that time the California district attorneys were in the midst of their investigation. *Id.*  
24 Plaintiff was forced to file a motion to compel to obtain information regarding any  
25 governmental investigations. That motion was taken off calendar after the parties reached this  
26 settlement. *Id.*, ¶16.

27 ///

28 ///

1           **C.     The DA Settlement and the Class Action Settlement**

2           Despite propounding discovery requests aimed at finding out about government  
3 investigations, Active kept Plaintiff in the dark about the California district attorneys'  
4 investigations until June 2016. Hurst Decl., ¶¶15, 20. On June 10, 2016, the district attorneys  
5 of Alameda, San Diego, and Sonoma counties filed a complaint challenging the deceptive  
6 nature of the Active Advantage program, and Plaintiff learned of the DA complaint shortly  
7 thereafter. Hurst Decl., ¶20. Five days later, the DAs and Active filed their settlement  
8 agreement in the form of a stipulated final judgment. *Id.* and Ex. B (hereinafter "DA  
9 Judgment").

10           The DA Judgment creates a \$1 million reversionary fund to reimburse consumers their  
11 Advantage membership fees. Under the DA settlement, all remaining funds go back to Active  
12 after a single 30-day claim period. DA Judgment, §§15, 17-18. In the DA Judgment, 1,087  
13 claims were submitted, resulting in an estimated \$101,091 in refunds (the claim review process  
14 is ongoing). Jue Decl., ¶7; Hurst Decl., ¶29.

15           The DA Judgment also includes a payment of \$2.85 million in civil penalties and  
16 investigative costs, but none of this amount goes to consumers. DA Judgment, §31.

17           The DA Judgment arises from a governmental enforcement action. It was not a class  
18 action and therefore did not and could not release Class Members' claims or provide a  
19 classwide release to Active. *Payne v. Nat'l Collection Sys., Inc.*, 91 Cal. App. 4th 1037, 1044-  
20 47 (2001); *People v. Pac. Land Research Co.*, 20 Cal. 3d 10, 17-18 (1977). Shortly after entry  
21 of the DA Judgment, the parties began settlement discussions to resolve Plaintiff's class  
22 action. Plaintiff agreed to settlement discussions and sent Active a list of documents and  
23 information that had not yet been obtained through discovery but was needed for the  
24 negotiations. Hurst Decl., ¶21.

25           The parties met for face-to-face settlement discussions on July 12, 2016. *Id.*, ¶22. At  
26 this first meeting various settlement approaches were discussed, including the possibility of  
27 working with the district attorneys. Initially, Active believed the DAs were open to this  
28 approach. Active and Class Counsel communicated continuously, often more than once a day,

1 to devise terms agreeable to each other, that were then presented to the district attorneys. The  
2 district attorneys did an about-face and informed the parties they were no longer able to  
3 coordinate the settlements because of bureaucratic restrictions they felt would take a lot of  
4 work to overcome. *Id.* The parties thereafter made revisions and alterations for a stand-alone  
5 settlement and, on September 20, 2016, filed a Notice of Conditional Settlement with this  
6 Court. *Id.*, ¶23; ROA #180.

### 7 **III. Settlement Terms And Notice**

#### 8 **A. The Settlement Fund**

9 Active will create a non-reversionary Settlement Fund of \$1.25 million. The  
10 Settlement Fund will be used to pay Class Members a full refund of all Active Advantage  
11 membership fees the Class Member has paid. *Stip.*, §III.A.1. These fees varied between  
12 \$59.95 and \$69.95 per year. *Hurst Decl.*, ¶28.

13 To receive their refund, Class Members need only complete and return a simple Claim  
14 Form within 30 days. This 30-day claim period is in addition to the 30-day claim period  
15 provided by the DA Judgment. In other words, Class Members who missed the chance to  
16 obtain a refund in the DA Judgment receive another opportunity for a full refund via this class  
17 action settlement. This amounts to a second notice to participate in the refund opportunity,  
18 significantly increasing the chances of participation in the settlement. Claim Forms can be  
19 returned by mail or Class Members can use the Settlement Website to submit their Claim Form  
20 electronically. *Stip.*, §§V.A., VI.B.

21 Refunds paid via the DA Judgment will be counted as a payment from the Settlement  
22 Fund, since the refunds were paid to Class Members. In addition, all Class Members who  
23 submit timely valid Claim Forms, whether submitted through the DA Judgment or the class  
24 action, will be entitled to receive additional money from the class settlement in the form of an  
25 Enhanced Settlement Award. *Stip.*, §III.A.3.

26 Enhanced Settlement Awards will be paid if, after all valid claims have been paid,  
27 sufficient funds remain. Enhanced Settlement Awards will be calculated as each Class  
28 Member's pro rata share of the remainder up to three times the value of the Class Member's

1 original settlement award. *Id.*, §III.A.3.

2 The claim submission period will close on January 9, 2016. While the validity of some  
3 of the claims submitted have yet to be determined, as of December 28, 2016, over 3,900  
4 claims have been submitted through this settlement – more than triple that submitted through  
5 the DA Judgment. Jue Decl., ¶7. Further, sufficient funds will remain for each valid claimant  
6 to receive the full Enhanced Settlement Award. Assuming the average membership refund is  
7 \$93 (extrapolating from the DA estimated average), the average settlement award provided by  
8 this settlement will be \$280. Hurst Decl., ¶¶28-29.

9 If Settlement Funds remain after all refunds and Enhanced Settlement Awards are paid,  
10 the remainder will be first used to pay for class notice and settlement administration costs and  
11 then to pay up to fifty percent of the attorneys' fees and expenses awarded by the Court. Any  
12 remaining amounts will be paid to the *Cy Pres* Recipient. Stip., §III.A.3.c. The *Cy Pres*  
13 Recipient holds sporting events for disabled adults and children throughout the United States,  
14 but only the California chapters will receive the *cy pres* benefits. Hurst Decl., ¶30. In the  
15 event the *Cy Pres* Recipient ceases to operate or is not deemed an appropriate *cy pres* recipient  
16 for any reason, the remainder of the Settlement Fund, if any, will be distributed to the State  
17 Bar's Justice Gap Fund pursuant to the Code of Civil Procedure §384. Hurst Decl., Ex. F (Tr.  
18 of Nov. 18, 2016 Hr'g) at 7:5-8:12.

19 **B. Donated Active Advantage Memberships**

20 In addition to the Settlement Fund, Active will donate Active Advantage memberships  
21 having a retail value of \$1,750,000, with the retail value based on the current annual fee of  
22 \$69.95 per membership. The free memberships will be given to university and college  
23 students, faculty and staff, YMCA members, Wounded Warriors in California, and other  
24 underprivileged or under-resourced groups that could use Active Advantage membership  
25 services. Hurst Decl., ¶30; Stip., §III.B.1-2.

26 The free memberships will entitle the holder to all benefits provided under the Active  
27 Advantage program (*e.g.*, waived event processing fees, discounts on travel, gear, and clothing  
28 through all Active Advantage vendors, and free registration for the fifth event); however, the

1 recipient will not be required to provide a credit card to initiate membership and will not have  
2 his or her Active Advantage membership automatically renewed for a fee. Stip., §III.B.3-4.

3 To distribute the free memberships, Active will contact the administrators of each  
4 group to discuss the best way to get the word out to potential recipients of each particular  
5 organization. In order for recipients to register for the membership, Active anticipates that it  
6 will provide a website link that the groups can distribute to their members. Those interested in  
7 joining can simply click on the link, input some basic information (such as their names and e-  
8 mail addresses), and then be enrolled in the Advantage program at no cost. There would be no  
9 credit card required to enroll and no automatic renewal of the Advantage membership. Hurst  
10 Decl., ¶30 and Ex. F at 9:7-10:19. Active will attempt to distribute all of the free memberships  
11 within three years. Stip., §III.B.5.

### 12 **C. Injunctive Relief**

13 As part of the DA Judgment, Active will make changes to its Active Advantage  
14 registration process to clearly and conspicuously disclose that Active Advantage is a  
15 membership program with annual fees and automatic renewal. Going forward, Active is also  
16 obligated to provide refunds to California consumers upon their request so long as the  
17 consumer has not used Advantage benefits prior to the refund request. Importantly, the  
18 injunctive relief obtained in the DA settlement is specifically incorporated into this settlement  
19 and Active is obligated to abide by those terms of injunctive relief as if they were fully set  
20 forth in the Stipulation. Stip., §III.C. That means Plaintiff or absent Class Members can seek  
21 enforcement of the injunctive relief in this Court without waiting for or depending on  
22 enforcement by the District Attorneys.

### 23 **D. Class Notice, Settlement Administration Costs, and Attorneys' Fees**

24 As part of the settlement relief, Active will also pay for class notice costs and  
25 settlement administration costs. Active can pay for notice and settlement administration costs  
26 out of the Settlement Fund only if funds remain after all valid refund claims are paid and after  
27 all Enhanced Settlement Awards are paid. Absent these conditions, Active will pay class  
28 notice and administration costs on top of the Settlement Fund. In other words, notice and



1 administration costs will in no circumstance reduce settlement awards to Class Members.  
 2 Stip., §III.A.3.c. and D. Class notice and settlement administration costs should be no more  
 3 than \$89,000. ROA #185 at ¶8. Notice mailing was completed pursuant to the Court's  
 4 preliminary approval order. ROA #189; Jue Decl., ¶¶3-5. The notice and Stipulation of  
 5 Settlement are also available on Class Counsel's website, and this motion will be posted as  
 6 well. Hurst Decl., ¶¶25-26. In addition, the Stipulation of Settlement, the notice and the claim  
 7 form, and other information about the settlement were posted on the Settlement Website,  
 8 which has been active since December 8, 2016. Jue Decl., ¶6.

9 Active will also pay attorneys' fees and expenses as awarded by the Court, and a \$750  
 10 plaintiff service award if awarded by the Court. Stip., §III.A.3.c. and D. As detailed *infra*,  
 11 Plaintiff's Counsel seeks a fee and expense award totaling \$800,000, which represents about  
 12 23% of the \$3.4 million minimum settlement value and is less than counsel's lodestar, to date.<sup>3</sup>  
 13 Active does not oppose the requested attorneys' fees and expenses or the plaintiff service  
 14 award. In accordance with best practices, the parties waited to negotiate attorneys' fees and  
 15 the service award until agreement was reached on all of the material terms of the settlement –  
 16 an unusually difficult task given the district attorneys' on-again/off-again approach. Hurst  
 17 Decl., ¶33; *see also In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 444-47 (3d Cir.  
 18 2016) (deferring the discussion of fees until after substantive settlement terms are agreed upon  
 19 is a practice routinely approved by courts).

#### 20 **IV. The Settlement Should Be Approved As Fair, Reasonable, And Adequate**

##### 21 **A. The Standards for Approving Class Action Settlements**

22 The court's role in approving a class action settlement is to determine whether, as a  
 23 whole, the settlement is fair, reasonable, and adequate. *Cellphone Termination Fee Cases*, 186  
 24 Cal. App. 4th 1380, 1389 (2010); *Roos v. Honeywell Int'l, Inc.*, 241 Cal. App. 4th 1472, 1482  
 25 (2015).<sup>4</sup> The approval of a class action settlement is a matter committed to the broad

26 \_\_\_\_\_  
 27 <sup>3</sup> The minimum settlement value consists of the \$1.25 million Settlement Fund; \$1.75  
 28 million in free memberships; at least \$400,000 in attorneys' fees paid separate from the  
 Settlement Fund.

<sup>4</sup> Internal quotes and citations omitted unless otherwise specified.

1 discretion of the trial court. *Cellphone*, 186 Cal. App. 4th at 1389; *Reed v. United Teachers*  
2 *L.A.*, 208 Cal. App. 4th 322, 336 (2012).

3 Although a court must independently review a proposed settlement, the court should  
4 avoid substituting its judgment for that of the counsel who negotiated the settlement. *Kullar v.*  
5 *Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 133 (2008). Due regard also should be given  
6 to what is otherwise a private, consensual agreement between the parties. *Cellphone*, 186 Cal.  
7 App. 4th at 1389; *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th  
8 1135, 1145 (2000). As such the approval inquiry “must be limited to the extent necessary to  
9 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by,  
10 or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,  
11 reasonable and adequate to all concerned.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965  
12 (9th Cir. 2009); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)  
13 (same); *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 245 (2001) (same).

14 The factors a court may consider in determining whether a class settlement is fair,  
15 reasonable and adequate include the amount offered in settlement, the strength of plaintiff’s  
16 case, the risk, expense, complexity, and likely duration of further litigation, the risk of  
17 maintaining class action status through trial, the extent of discovery completed and the stage of  
18 proceedings, the experience and views of counsel, and the reaction of the class members to the  
19 proposed settlement. *Cellphone*, 186 Cal. App. 4th at 1389 (quoting *Kullar*, 168 Cal. App. 4th  
20 at 128); *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996).

21 Further, the court should presume a class settlement is fair where: “(1) the settlement is  
22 reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to  
23 allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation;  
24 and (4) the percentage of objectors is small.” *Carter v. City of L.A.*, 224 Cal. App. 4th 808,  
25 820 (2014) (quoting *Dunk*, 48 Cal. App. 4th at 1802); *7-Eleven Owners*, 85 Cal. App. 4th at  
26 1146. Considering any or all of these factors demonstrates that this settlement is fair,  
27 reasonable and adequate and should be approved.

28

1           **B.       The Settlement Amount and the Risk of No Recovery**

2           The value of the settlement to the class is perhaps the most important consideration in  
3 determining whether a settlement is fair, reasonable and adequate. *Harman v. City and Cnty.*  
4 *of S.F.*, 136 Cal. App. 4th 1279, 1312 (2006); *Glendora Cmty. Redevelopment Agency v.*  
5 *Demeter*, 155 Cal. App. 3d 465, 475-76 (1984).

6           This settlement meets the test. Claimants will receive full refunds of all Active  
7 Advantage membership fees they paid, in an amount between \$59.95 and \$69.95 per year. All  
8 claimants, including those who submitted claims under the DA Judgment, are also entitled to  
9 an Enhanced Settlement Award. Hurst Decl., ¶¶28-29. We anticipate all claimants will  
10 receive Enhanced Settlement Awards of three times their full refund. The average settlement  
11 award will be about \$280. *Id.*

12           Additionally, \$1.75 million worth of free Advantage memberships will be donated to  
13 under-privileged or under-resourced persons in California. Stip., §III.B. And the injunctive  
14 relief negotiated by the DAs, including Active's agreement to fully refund Advantage  
15 membership fees going forward on the California member's request, are incorporated into this  
16 settlement and enforceable in this Court, including through motion by Class Counsel. *Id.*,  
17 §III.C.

18           The settlement is also fair, reasonable and adequate given the risks of obtaining class  
19 certification, the risks of trial, and the expense of continued litigation. As to class certification,  
20 it would be complicated given Active's contention that it could not definitively identify who  
21 had used Advantage membership discounts, and therefore Plaintiff would be unable to  
22 ascertain who had been deceived into enrollment and which persons had knowingly enrolled to  
23 obtain membership discounts. Hurst Decl., ¶31. The expense of litigating a case like this  
24 through trial is costly, especially with the need to retain market research and statistics experts  
25 to conduct analyses to prove liability and establish damages. Moreover, the settlement also  
26 eliminates the risk that Plaintiff and the Class could succeed at trial only to have Active  
27 significantly delay payment of the judgment by appeal. Active has abundantly demonstrated  
28 its scorched earth defense and delay tactics and would most likely appeal any judgment after

1 trial. *Id.*, ¶32.

2 **C. The Settlement Was Reached After Arm's-Length Negotiations**

3 “[T]he fact that the settlement agreement was reached in arm’s length negotiations after  
4 relevant discovery [has] taken place create[s] a presumption that the agreement is fair.” *In re*  
5 *Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007).

6 In this case, there is no question that the negotiations were arm’s-length and  
7 contentious. Settlement discussions did not even begin until Active was unable to dispose of  
8 the case through two-and-a-half years of motion practice and until after Plaintiff had received  
9 most all of the written discovery requested and was well on the way to preparing for class  
10 certification. Hurst Decl., ¶¶3, 6-19.

11 Once discussion began, it took over three months (to the Court’s frustration) and  
12 numerous drafts and reconfigurations of the settlement before the Stipulation of Settlement  
13 was finally executed on October 26, 2016. The provisions on attorneys’ fees and expenses, for  
14 example, were not agreed to until the very day the settlement agreement was executed. Hurst  
15 Decl., ¶33. The arm’s-length negotiations support the presumptive fairness of the settlement.

16 **D. The Stage of Proceedings and the Extent of Discovery Completed**

17 The formal and informal discovery and motion practice completed in this case has been  
18 extensive. By way of example only, the completed discovery includes 135 discovery requests  
19 exchanged between the parties, the deposition of two non-parties, over 1,800 pages of  
20 documents produced by other third parties in response to subpoenas for production, and over  
21 300 pages of documents from the Vermont and Iowa Attorneys General regarding their  
22 respective investigations into the deceptive nature of the Active Advantage program. Hurst  
23 Decl., ¶¶12-16. Plaintiff has received and reviewed over 114,000 pages of documents from  
24 Active and third parties. *Id.*

25 The motions that honed the parties’ respective positions for settlement negotiations  
26 included Active’s two removals and Plaintiff’s corresponding motions for remand, Active’s  
27 motion for a determination that the action had no merit, Active’s motion to disqualify  
28 Plaintiff’s Counsel, Plaintiff’s motion to quash the deposition subpoenas served by Active on

1 one of Plaintiff's Counsel and on an absent Class Member, and Plaintiff's motion to compel  
2 documents regarding governmental investigations. Hurst Decl., ¶¶6-8, 16-19. Further, with  
3 her motion for class certification due on September 15, 2016, Plaintiff was well on her way to  
4 preparing for class certification at the time settlement talks began on July 12, 2016. *Id.*, ¶3.  
5 The extent of discovery and the stage of the litigation were such that the parties were well  
6 informed and could act intelligently in the settlement negotiations.

#### 7 **E. The Judgment of Experienced Counsel**

8 The opinion of experienced counsel who litigated the case, negotiated the settlement,  
9 and support the settlement is entitled to considerable weight. *Wershba*, 91 Cal. App. 4th at  
10 245. When the counsel recommending the settlement are competent and experienced,  
11 significant weight may be given to their opinion. *Hartless v. Clorox Co.*, 273 F.R.D. 630, 637-  
12 38 (S.D. Cal. 2011), *aff'd*, 2012 U.S. App LEXIS 10539 (9th Cir. 2012); *Nat'l Rural*  
13 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

14 Class Counsel have litigated and settled a wide range of consumer class action cases in  
15 California and other state courts and in federal courts across the country. Hurst Decl., ¶27.  
16 Class Counsel have the requisite experience to give a reasoned opinion on this settlement.  
17 Their recommendation is also based upon their familiarity with the factual and legal issues  
18 developed during the motion practice and discovery. Accordingly, Class Counsel's  
19 recommendation of the settlement is entitled to due consideration and further approval.

#### 20 **F. The Reaction of the Class**

21 The Court should also consider the reaction of the Class Members to the proposed  
22 settlement. *Cellphone*, 186 Cal. App. 4th at 1389; *Dunk*, 48 Cal. App. 4th at 1801. The class  
23 notice describing the settlement was distributed to Class Members on December 8, 2016. The  
24 objection and opt-out deadline is January 13, 2016.

25 As of the time of this filing, there are no objections or requests for exclusion. To the  
26 contrary, all of the Class Members who have contacted Class Counsel are uniformly pleased  
27 with the settlement relief to be provided. Hurst Decl., ¶26. Plaintiff will address objections  
28 and opt-outs, if any, in her reply brief.

1 **V. The Class Should Be Certified For Settlement Purposes**

2 Courts recognize the propriety of certifying a settlement class to resolve consumer  
3 protection lawsuits. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 445 (2000); *Hanlon*, 150 F.3d  
4 at 1017, 1019. When presented with certification of a settlement class, a court must determine  
5 whether the proposed class satisfies the requirements for class certification under California  
6 law. However, in assessing the class certification requirements, a court may properly consider  
7 that there will be no trial, and therefore potential trial management problems, if any, are  
8 obviated for the settlement class. *Glob. Minerals & Metals Corp. v. Super. Ct.*, 113 Cal. App.  
9 4th 836, 859 (2003) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)); *Wash.*  
10 *Mut. Bank v. Super. Ct.*, 24 Cal. 4th 906, 923 (2001).

11 “In order to maintain a class action, certain prerequisites must be met, specifically, the  
12 existence of an ascertainable class and a well-defined community of interest among the class  
13 members.” *Marler v. E.M Johansing, LLC*, 199 Cal. App. 4th 1450, 1459 (2011). “The  
14 community of interest requirement embodies three factors: (1) predominant common questions  
15 of law or fact; (2) class representatives with claims or defenses typical of the class; and  
16 (3) class representatives who can adequately represent the class.” *Id.* at 1459. In addition, the  
17 class action procedure should provide “substantial benefits to litigants and the courts,”  
18 meaning that proceeding as a class is superior to other methods of adjudication. *In re Tobacco*  
19 *II Cases*, 46 Cal. 4th 298, 313 (2009).

20 Here, “this Court preliminarily f[ound] that the Action meets all the prerequisites of  
21 California Code of Civil Procedure, §382 and California Civil Code §1781, including  
22 numerosity, ascertainability, community of interest, predominance of common issues,  
23 superiority and typicality, and that Plaintiff and Class Counsel are adequate representatives of  
24 the Class.” ROA #189 at 1. The Court should finalize its findings that the action satisfies  
25 class certification requirements.

26 ///

27 ///

28 ///

1           **A.     The Class Is Ascertainable and Joinder Is Impractical**

2           In determining whether there is an ascertainable class, courts look to whether the class  
3 definition uses “objective characteristics and common transactional facts” so that an individual  
4 can identify himself as having a right to recover based upon that description. *Marler*, 199 Cal.  
5 App. 4th at 1460; *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal. App. 4th 734, 746 (2009).

6           Here, this Court preliminarily approved a Class consisting of:

7           All California consumers who, based on Active’s records, from January 1, 2010  
8 through December 31, 2013, enrolled in Active Advantage by means of a sign-  
9 up process offered, advertised, or initiated on any interstitial webpage appearing  
10 after the completion of the Registration Process, provided that any such  
consumer has not already: (a) obtained a refund for all moneys paid for Active  
Advantage other than through the DA Judgment; or (b) Used Active Advantage.

11 ROA #189. The term “California Consumers” means those with a billing address in  
12 California, and the term “Used Active Advantage” means that a Class Member has obtained or  
13 received one or more discounts on goods, services, or travel by virtue of membership in Active  
14 Advantage, not including any discount given contemporaneously with initial enrollment. *Stip.*,  
15 §II.A.4. and 33. The Class definition is precise and objective.

16           Further, it is impracticable to bring all Class Members before the Court. Notice was  
17 disseminated to over 104,000 persons that met the Class definition. *Jue Decl.*, ¶5. Joinder  
18 would be impracticable. *See Aguilar v. Cintas Corp. No. 2*, 144 Cal. App. 4th 121, 138  
19 (2006).

20           **B.     Common Issues Predominate**

21           The test for predominance is: (1) whether the issues common among the class members  
22 “would be the principal issues in any individual action, both in terms of time to be expended in  
23 their proof and of their importance”; and (2) “that if a class suit were not permitted, a  
24 multiplicity of legal actions dealing with identical basic issues would be required in order to  
25 permit recovery by each [absent class member].” *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 810  
26 (1971). The focus is on how liability would be established, not on whether each and every  
27 issue in the case is identical for each and every class member. *See Sav-On Drug Stores, Inc. v.*  
28 *Super. Ct.*, 34 Cal. 4th 319, 338 (2004). A case should be certified for class treatment if it

1 appears the defendant engaged in a common course of conduct. *Vasquez*, 4 Cal. 3d at 808.

2 Active engaged in a common course of conduct by enrolling unwitting registrants in its  
3 Advantage program when they registered for an event on the Active website. Active then  
4 charged the annual membership fee, year after year, to the credit card used to register for the  
5 event. Hurst Decl., ¶5. The predominate, common legal question is whether Active's conduct  
6 is deceptive to reasonable consumers and in violation of the Unfair Competition Law,  
7 Business and Professions Code §§17200, *et seq.* (UCL), and the Consumer Legal Remedies  
8 Act, Civil Code §§1750, *et seq.* (CLRA).

9 **C. Plaintiff's Claims Are Typical of the Class**

10 A representative plaintiff's claims are typical if they are significantly similar to those  
11 of the other class members and if the plaintiff was subjected to the same alleged wrong as  
12 other class members. *See Daniels v. Centennial Group, Inc.*, 16 Cal. App. 4th 467, 473  
13 (1993); *Fireside Bank v. Super. Ct.*, 40 Cal. 4th 1069, 1090 (2007).

14 Here, Plaintiff was subjected to same conduct by Active as the rest of the Class, and  
15 thus her claim that the Active Advantage enrollment process is deceptive and in violation of  
16 the UCL and CLRA is the same claim asserted on behalf of all Class Members.

17 **D. Plaintiff and Class Counsel Will Adequately Represent the Class**

18 The adequacy requirement is met because Plaintiff is represented by counsel qualified  
19 to conduct the pending litigation, and her interests are not "antagonistic to the class."  
20 *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 475 (1981); *McGhee v. Bank of Am.*, 60 Cal.  
21 App. 3d 442, 450 (1976). Class Counsel are experienced in prosecuting class action litigation,  
22 including consumer class actions, and thus is "qualified, experienced and generally able to  
23 conduct the proposed litigation." *Miller v. Woods*, 148 Cal. App. 3d 862, 874 (1983). *See*  
24 Hurst Decl., ¶27.

25 Additionally, "only a conflict that goes to the very subject matter of the litigation will  
26 defeat a party's claim of representative status." *Richmond*, 29 Cal. 3d at 470. That is, only  
27 conflicts that are "irreconcilable" can defeat adequacy. *Nat'l Solar Equip. Owners' Ass'n v.*  
28 *Grumman Corp.*, 235 Cal. App. 3d 1273, 1286 (1991). Here, no conflicts exist.



1           **E.     A Class Action Is Superior to Other Methods of Litigation**

2           Judicial economy, efficiency, and promoting uniformity of decisions are paramount in  
3 deciding whether a class action is superior to other forms of adjudication. 2 William  
4 Rubenstein, Alba Conte & Herbert Newberg, *Newberg on Class Actions*, §4.39 (4th ed. 2010);  
5 *see also Linder*, 23 Cal. 4th at 446. The benefits and burden “comparison lies between the  
6 costs and benefits of adjudicating plaintiffs’ claims in a class action and the costs and benefits  
7 of proceeding by numerous separate actions.” *Sav-On*, 34 Cal. 4th at 339 n.10. A class action  
8 is also a superior mechanism “when numerous parties suffer injury of insufficient size to  
9 warrant individual action and when denial of class relief would result in unjust advantage to  
10 the wrongdoer.” *Blue Chip Stamps v. Super. Ct.*, 18 Cal. 3d 381, 385 (1976).

11           Here, the costs and benefits of a classwide resolution far outweigh the alternative of  
12 individual proceedings because such individual litigations would be unnecessarily  
13 cumbersome and time consuming for Class Members and the Court, and would likely result in  
14 inconsistent decisions for similarly situated persons. Additionally, the Active Advantage  
15 membership fees were between \$59.95 and \$69.95. Since the size of the injury to any one  
16 Class Member does not warrant an individual action, absent a class action, Active would  
17 unjustly reap the benefit of its deceptive and unfair practices.

18           The Class meets each of the requirements for certification. The Court should therefore  
19 certify the Class for settlement purposes.

20           **VI.    Plaintiff’s Counsel Are Entitled To An Award Of Attorneys’ Fees And Expenses**

21           Plaintiff’s Counsel are entitled to an award of attorneys’ fees and expenses under the  
22 CLRA’s fee-shifting provision, under the substantial benefit and common fund doctrines, and  
23 by agreement of the parties.

24           Pursuant to the CLRA’s mandatory fee-shifting provision, “[t]he court shall award  
25 court costs and attorney’s fees to a prevailing plaintiff in litigation filed pursuant to this  
26 section.” Civ. Code §1780(e); *see also Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App.  
27 4th 140, 160 (2006). Since the CLRA does not define the term “prevailing plaintiff,” “the  
28 court should adopt a pragmatic approach, determining prevailing party status based on which

1 party succeeded on a practical level,” such as “the extent to which each party has realized its  
2 litigation objectives, whether by judgment, settlement, or otherwise.” *Graciano*, 144 Cal.  
3 App. 4th at 150-51. Here, Plaintiff has fully realized her litigation objectives by obtaining an  
4 excellent settlement total at least \$3.4 million, which includes full refunds, enhancements to  
5 those refunds, and \$1.75 million-worth of free memberships.

6 Additionally, counsel are entitled to fees and expenses under the common fund and the  
7 closely related substantial benefit doctrines. “[O]ne who expends attorneys’ fees in winning a  
8 suit which creates a fund from which others derive benefits, may require those passive  
9 beneficiaries to bear a fair share of the litigation costs.” *Quinn v. State of Cal.*, 15 Cal. 3d 162,  
10 167 (1975); *see also Winslow v. Harold G. Ferguson Corp.*, 25 Cal. 2d 274, 277 (1944);  
11 *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977). The substantial benefit doctrine - an outgrowth of  
12 the common fund doctrine – “permits the award of fees when the litigant, proceeding in a  
13 representative capacity, obtains a decision resulting in the conferral of a ‘substantial benefit’ of  
14 a pecuniary or nonpecuniary nature.” *Serrano*, 20 Cal. 3d at 38.

15 Finally, through the settlement, the Parties entered into a contract where Active agreed  
16 to pay Plaintiff’s Counsel attorneys’ fees and expenses in an amount up to \$800,000. *Stip.*,  
17 §§III.D., X.A.

18 The choice of a fee calculation method, either the percentage or lodestar approach, is  
19 generally within the trial court’s discretion, with the goal “being the award of a reasonable fee  
20 to compensate counsel for their efforts.” *Laffitte v. Robert Half Int’l, Inc.*, 1 Cal. 5th 480, 504  
21 (2016).

22 Plaintiff’s Counsel seek fee and expense awards totaling \$800,000. After accounting  
23 for \$20,694 in out-of-pocket expenses, the \$779,306 remaining for attorneys’ fees is  
24 substantially less than Plaintiff’s Counsel’s lodestar, and just 23% of the minimum \$3.4  
25 million in benefits the settlement provides and just 20% of the potential maximum settlement  
26 value of \$3,889,000. The requested attorneys’ fees are reasonable under both the lodestar and  
27 percentage of benefit approaches.

28 ///

1           **A.       The Requested Fee Is Reasonable Under the Lodestar Method**

2           “Under California law, the primary method for determining the amount of reasonable  
3 attorneys’ fees is the lodestar method.” *Hartless*, 273 F.R.D. at 642-43<sup>5</sup> (citing *In re*  
4 *Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556-57 and n.13 (2009); *see also Graciano*,  
5 144 Cal. App. 4th at 154; *Serrano*, 20 Cal. 3d at 48 n.23 (“The starting point of every fee  
6 award . . . must be a calculation of the attorney’s services in terms of the time he has expended  
7 on the case.”). This is particularly true when fees are awarded under a fee shifting statute.  
8 *Laffitte*, 1 Cal. 5th at 500.

9           Under the two-step lodestar/multiplier method, trial courts first calculate the lodestar,  
10 consisting of all the hours reasonably spent multiplied by reasonable hourly rates. *Ketchum v.*  
11 *Moses*, 24 Cal. 4th 1122, 1133 (2001). That figure may be enhanced or multiplied “by the  
12 court based on a number of factors in order ‘to fix a fee at the fair market value for the  
13 particular action.’” *Syers Props. III v. Rankin*, 226 Cal. App. 4th 691, 697-98 (2014) (citing  
14 *Ketchum*, 24 Cal. 4th at 1132). The purpose of using the lodestar/multiplier method is to  
15 mirror the legal marketplace: The adjusted lodestar should not be significantly different from  
16 the percentage fee freely negotiated in comparable litigation. *Lealao*, 82 Cal. App. 4th at 50.

17           In this case, Plaintiff’s Counsel’s lodestar is over \$845,500. Hurst Decl., ¶42.  
18 Accordingly, the requested \$779,306 fee award represents a negative multiplier of 0.92.

19           **1.       The Hourly Rates Are Reasonable**

20           Plaintiff’s Counsel are entitled to the hourly rates charged by attorneys of comparable  
21 experience, reputation, and ability for similar litigation. *Ketchum*, 24 Cal. 4th at 1133.  
22 “Generally, the courts will look to equally difficult or complex types of litigation to determine  
23 which market rates to apply.” *Syers Props.*, 226 Cal. App. 4th at 700. Payment at full market  
24 rates is essential to fulfill the goal of enticing qualified counsel to undertake difficult consumer  
25 litigation, such as this. *San Bernardino Valley Audubon Soc’y v. Cnty. of San Bernardino*, 155  
26 Cal. App. 3d 738, 755 (1984). Plaintiff’s Counsel’s background, experience, and hourly rates

27           <sup>5</sup> California courts consider federal authorities in awarding attorneys’ fees and expenses  
28 in class action settlements. *Serrano v. Unruh*, 32 Cal. 3d 621, 639 n.29 (1982); *Lealao v.*  
*Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 47-52 (2000); *Wershba*, 91 Cal. App. 4th at 254.

1 are set forth in their concurrently filed declarations. Court-appointed Class Counsel, Blood  
2 Hurst & O'Reardon, LLP, has an excellent reputation as class action litigators, with  
3 specialized experience in false advertising and consumer protection class action law. Hurst  
4 Decl., ¶27. Robert Loewy of Law Office of Robert G. Loewy, P.C. is also experienced in  
5 class action litigation and as a trial attorney. Loewy Decl., ¶¶2-4. Steven Marchbanks of  
6 Premier Legal Center, A.P.C. specializes in plaintiff individual and class action litigation and  
7 was integral at the early stages of the case. Marchbanks Decl., ¶¶3-5, 11-12. The hourly rates  
8 of Plaintiff's Counsel (between \$560 and \$810 for partners; between \$275 and \$440 for  
9 associates) are well within the range of rates billed by comparable attorneys in this market and  
10 are the standard rates they charge to all of their clients.<sup>6</sup> Hurst Decl., ¶¶37-38; Loewy Decl.,  
11 ¶15; Marchbanks Decl., ¶15.

12 Moreover, Plaintiff's Counsel's lodestar is calculated using rates that have been  
13 accepted as reasonable. *See, e.g., Hartless*, 273 F.R.D. at 644 (approving hourly rates of  
14 Blood Hurst & O'Reardon, LLP, stating that "based on the Court's familiarity with the rates  
15 charged by other firms in the San Diego area, the Court finds the rates charged by the attorneys  
16 and paralegals in this action reasonable"); *Shames v. Hertz Corp.*, No. 07-CV-02174-  
17 MMA(WMC), 2012 U.S. Dist. LEXIS 158577, at \*60 (S.D. Cal. Nov. 5, 2012) (approving  
18 hourly rates based on *Hartless*, and stating that "[t]he *National Law Journal* data reveals that  
19 rates at six national defense firms with San Diego offices averaged between \$550 and \$747 per  
20 hour for partners and \$346 and \$508 per hour for associates"); *Dennis v. Kellogg Co.*, No. 09-  
21 CV-01786-L (WMC), 2013 U.S. Dist. LEXIS 163118, at \*22-23 (S.D. Cal. Nov. 14, 2013)  
22 (approving hourly rates of Blood Hurst & O'Reardon, LLP as "fall[ing] within typical rates for  
23 attorneys of comparable experience"); *Johnson v. Gen. Mills, Inc.*, No. SACV 10-00061-  
24 CJC(ANx), 2013 U.S. Dist. LEXIS 90338, at \*19-21 and n.3 (C.D. Cal. June 17, 2013)  
25 (approving hourly rates and time spent by Blood Hurst & O'Reardon, LLP, stating "[t]he  
26 Court has considered class counsel's rates and finds they are reasonable because of the  
27

28 <sup>6</sup> An attorney's actual billing rate for similar work is presumptively appropriate. *See Wershba*, 91 Cal. App. 4th at 254-55.

1 experience of the attorneys and prevailing market rates”); *POM Wonderful, LLC v. Purely*  
2 *Juice, Inc.*, No. CV 07-02633 CAS (JWJx), 2008 U.S. Dist. LEXIS 110460, at \*11-13 (C.D.  
3 Cal. Sept. 22, 2008) (partner rates of \$450 to \$750 and associate rates of \$275 to \$425 were  
4 reasonable).<sup>7</sup>

5 Another way to measure rates is by comparison to billing surveys and the Laffey  
6 Matrix. Plaintiff’s Counsel’s rates are reasonable based on either. *See* Hurst Decl., Ex. C (the  
7 2014 National Law Journal Billing Survey provides the following for Southern California  
8 firms: Irell & Manella (\$975-\$800 partner rates, \$750-\$395 associate rates); Manatt, Phelps &  
9 Phillips (\$795-\$640 partner rates); O’Melveny & Myers (\$950-\$615 partner rates); Sheppard,  
10 Mullin, Richter & Hampton (\$875-\$490 partner rates, \$535-\$275 associate rates). Likewise  
11 the Laffey Matrix (developed based on years in practice and location) shows Plaintiff’s  
12 Counsel’s rates are reasonable. *See Chanel, Inc. v. Doan*, No. C 05-03464 VRW, 2007 U.S.  
13 Dist. LEXIS 22691, at \*17-19 (N.D. Cal. 2007) (citing *Laffey v. Nw. Airlines, Inc.*, 572 F.  
14 Supp. 354 (D.D.C. 1983), *aff’d in part, rev’d in part on other grounds* by 746 F.2d 4 (D.C.  
15 Cir. 1984)); *see also* Hurst Decl., ¶38 and Ex. D (Laffey Matrix). Following the *Chanel*  
16 adjustment method, the Judicial Salary Plan effective January 11, 2016, includes a 24.73%  
17 locality pay for San Diego/Carlsbad (home to the offices of BHO and Mr. Marchbanks), a  
18 27.65% locality pay for Los Angeles/Long Beach (home to the office of Mr. Loewy), and a  
19 24.78% locality pay for Washington, D.C.<sup>8</sup> This means that converting the Laffey Matrix to  
20 San Diego rates is accomplished by subtracting 0.05% from the Washington, D.C. rate  
21 (resulting in hourly rates between \$607.70 and \$825.59 being deemed reasonable), and the Los  
22

23 <sup>7</sup> *See also Sproul v. Astrue*, No. 11-CV-01000-IEG (DHB), 2013 U.S. Dist. LEXIS  
24 12667, at \*2, \*5-6 (S.D. Cal. Jan. 30, 2013) (awarding an amount that represented an hourly  
25 rate of roughly \$800, explaining that “[c]ourts are loathe to penalize experienced counsel for  
26 efficient representation under contingency agreements”); *Samson v. Nama Holdings, LLC*, No.  
27 CV 09-01433 MMM (PJWx), 2009 U.S. Dist. LEXIS 114494, at \*14 (C.D. Cal. Aug. 10,  
28 2009) (finding attorney rates of \$510 to \$800, and a legal assistant rate of \$270 to be  
reasonable); *Housing Rights Ctr. v. Sterling*, No. CV 03-859 DSF (Ex), 2005 U.S. Dist.  
LEXIS 31872, at \*10 (C.D. Cal. Nov. 2, 2005) (noting hourly rates may run up to \$1,000 per  
hour in Los Angeles, with \$125 to \$650 routine in California).

<sup>8</sup> *See* Hurst Decl., ¶38 and Ex. E.

1 Angeles/Long Beach rate is achieved by adding 2.87% to the Washington, D.C. rate (resulting  
2 in a \$849.71 hourly rate being deemed reasonable). Hurst Decl., Ex. D. Thus, using the  
3 Laffey Matrix, the hourly rates of \$275.00 to \$810.00 for the BHO attorneys and Mr.  
4 Marchbanks, and the hourly rate of \$645.00 for Mr. Loewy, are reasonable.

## 5 2. The Hours Expended Are Reasonable

6 Plaintiff's Counsel worked hard on this case. For almost three years, in front of three  
7 different presiding judges in state court, and two removals to federal court, Plaintiff's Counsel  
8 have spent over 1,536 hours on this litigation, and more work remains. Hurst Decl., ¶¶37, 42;  
9 Loewy Decl., ¶¶9, 16; Marchbanks Decl., ¶¶9-10. Over half of the time (about 796 hours) was  
10 incurred by Class Counsel, Blood Hurst & O'Reardon, LLP. Hurst Decl., ¶¶34, 37. And most  
11 of Class Counsel's time was incurred by two lawyers, Leslie Hurst and Camille Bass, an  
12 indication of the efficient way in which this case was litigated. Ms. Hurst had her hands on  
13 every aspect of the litigation, from motion practice to discovery and through settlement  
14 negotiations and drafting all settlement papers. *Id.*, ¶36. And additional work will be  
15 required, including the final approval reply brief, the final approval hearing, and oversight of  
16 the claim review and settlement award distribution processes.

### 17 B. The Requested Fee Is Reasonable Under the Percentage of Fund and 18 Substantial Benefit Approaches

19 When class action litigation creates a fund for the benefit of the class members, the trial  
20 court may award class counsel a fee out of that common fund by choosing an appropriate  
21 percentage of the fund created. *Laffitte*, 1 Cal. 5th at 503. Similarly, when representative  
22 litigation creates a substantial benefit, the court may award attorneys' fees so that those  
23 receiving the benefit contribute to the costs of its production. *Serrano*, 20 Cal. 3d at 38.

24 In assessing whether the percentage requested is fair and reasonable, courts have  
25 considered the following factors: (1) the result achieved; (2) the skill required and quality of  
26 work by counsel; (3) the risk involved in the litigation and complexity of the issues; (4) the  
27 contingent nature of the fee; and (5) awards made in similar cases. *Vizcaino v. Microsoft*  
28 *Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002); *see also Laffitte*, 1 Cal. 5th at 504.

1 Here, the settlement potentially provides over \$3.8 million in benefits (with a minimum  
 2 value of \$3.4 million), consisting of: \$1.25 million settlement fund; \$1.75 million free  
 3 memberships; \$800,000 of attorneys' fees and expenses; up to \$89,000 in notice and  
 4 administration costs; and \$750 service award, all paid by Active. The requested fee represents  
 5 23% of the total minimum benefits and 20% of the maximum settlement value.<sup>9</sup>

### 6 1. Results Achieved

7 The results achieved by Plaintiff's Counsel through this settlement are excellent and  
 8 alone justify the requested fee award. For instance, the \$1.25 million non-reversionary  
 9 Settlement Fund has proven to be outstanding. Each claimant will receive full refunds of all  
 10 Active Advantage membership fees they paid, in an amount between \$59.95 and \$69.95 per  
 11 year. Further, it appears that funds will be sufficient to pay each claimant the full Enhanced  
 12 Settlement Award, meaning that all valid claimants will receive three times their full refund.  
 13 Hurst Decl., ¶¶28-29. Class Counsel anticipates the average settlement award will be \$280.  
 14 *Id.* In comparison, the DA Judgment established a \$1 million fund where the unclaimed  
 15 amounts revert to Active. The class action settlement also resulted in three times more claims  
 16 than the district attorney settlement.

17 The Court should also note that because the DA complaint was not filed until June  
 18 2016, the UCL's four year statute of limitations (the cause of action alleged by the DAs)  
 19 would only justify refunds in the DA case back to June of 2012. In contrast, this case was  
 20 filed in February 2014 and covered a class back four years, to the beginning of 2010. This  
 21 additional two and half year period covered in the class action (but not in the DA action) no  
 22 doubt motivated Active to provide membership refunds in the DA action back to 2010. The

23  
 24 <sup>9</sup> When attorneys' fees are paid separate and apart from the settlement fund, the total  
 25 settlement benefit to the class (settlement fund and attorneys' fees) are used to measure the  
 26 reasonableness of the fees. *See In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 554  
 27 (2009) ("the sum of the two amounts [settlement fund and attorneys' fees] ordinarily should be  
 28 treated as a settlement fund for the benefit of the class, with the agreed-on fee amount  
 constituting the upper limit on the fees that can be awarded to counsel. The total fund could be  
 used to measure whether the portion allocated to the class and to attorney fees is reasonable." (citing Manual for Complex Litigation (Fourth) §21.71, p. 525) (*see* additional authorities cited therein).

1 DAs have this case to thank for refunds provided outside the limitations period in their case.

2 In addition to the cash refunds, Active will provide \$1.75 million in free memberships,  
3 change its practices going forward, and pay attorneys' fees and costs. This is a good  
4 settlement for which a fee of 20% - 23% is reasonable.

## 5 2. Skill Required and the Quality of the Work

6 This case required counsel skilled in class actions and tenacious in litigation. From  
7 inception of this case in 2014, Active undertook a highly aggressive defense aimed to cut this  
8 litigation short at every possible turn. As this Court recognized, Active employed a scorched  
9 earth litigation strategy. In denying the motion to disqualify, the Court demonstrated its  
10 frustration with Active's "tactical abuse" and efforts "to delay the case" and "avoid the merits  
11 by increasing the costs for plaintiff." ROA #128 at 3-4.

12 Nothing was easy in this case, including discovery. In addition to the routine  
13 disagreements over production, privilege logs, and depositions, Active took every opportunity  
14 to make discovery inordinately expensive and time consuming. For example, it issued  
15 subpoenas to depose opposing counsel and an unnamed Class Member, stating this discovery  
16 was necessary for its motion to disqualify. Hurst Decl., ¶¶17. But even though the motion was  
17 denied, Active refused to withdraw its deposition subpoenas, necessitating a hearing on  
18 Plaintiff's motion to quash. *Id.*, ¶¶18-19. In granting Plaintiff's motion, the Court reiterated  
19 its aggravation with Active, stating that "[t]he deposition notices are evidence of a 'scorched  
20 earth' defense which defendant would be well advised to reconsider." ROA #158. Active also  
21 refused to produce documents or information regarding any governmental investigations into  
22 the Advantage program, forcing Plaintiff to seek information directly from the Iowa and  
23 Vermont Attorneys General and to move to compel the remainder of information from Active.  
24 Hurst Decl., ¶¶14-16. Active knew about the investigation of the Advantage program by the  
25 California district attorneys but would not inform Plaintiff. This ultimately necessitated  
26 substantial additional work to formulate a settlement entirely separate from the DA Judgment.  
27 *Id.*, ¶¶15, 23.



1 The skill and tenacity of Plaintiff's Counsel was put to the test throughout this  
2 litigation, but resulted in an extremely favorable settlement for the Class and justifies the  
3 requested attorneys' fee award.

### 4 3. Litigation Risks and Difficulty of the Issues Presented

5 At the same time that Plaintiff's Counsel was ready to proceed with class certification,  
6 they knew the Class faced obstacles. Class certification would be complicated by Active's  
7 contention that it could not definitively identify which persons had used Advantage  
8 membership discounts, and therefore Plaintiff would be unable to ascertain with certainty  
9 which persons had been deceived into enrollment and which persons had intentionally enrolled  
10 to obtain the membership discounts. Hurst Decl., ¶31.

11 If class certification was granted, there would still be the inherent risks of trial. Proof  
12 of Plaintiff's case at trial would have required expert testimony and an expert survey or other  
13 evidence to establish Active's enrollment process was deceptive as Plaintiff alleged. *Id.*  
14 Plaintiff and the Class could succeed at trial only to have Active significantly delay payment  
15 of the judgment by appeal (a distinct possibility given Active's proclivity for delay) or even  
16 overturn the judgment on appeal. *Id.*, ¶32; Part IV.D, *supra*.

### 17 4. Contingent Nature of the Case

18 An attorney whose compensation is dependent on success – who takes a significant risk  
19 of no compensation – should expect a significantly higher fee than an attorney who is paid a  
20 market rate as the case goes along, win or lose. *Cazares v. Saenz*, 208 Cal. App. 3d 279, 288  
21 (1989). Our Supreme Court writes:

22 A contingent fee must be higher than a fee for the same legal services paid as  
23 they are performed. The contingent fee compensates the lawyer not only for the  
24 legal services he renders but for the loan of those services. The implicit interest  
25 rate on such a loan is higher because the risk of default (the loss of the case,  
which cancels the debt of the client to the lawyer) is much higher than that of  
conventional loans.

26 *Ketchum*, 24 Cal. 4th at 1132-33.

27 Plaintiff's Counsel undertook this litigation on a purely contingent basis, thereby  
28 bearing the full risk of non-recovery. Hurst Decl., ¶35; Loewy Decl., ¶12; Marchbanks Decl.,

¶8. The fee award should reflect this risk.

### 5. The Market Rate in Similar Contingent Litigation

In California, attorneys' fee awards of 33% of the value of the recovery to the class are common. Indeed, "[e]mpirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11. In *Laffitte*, the Supreme Court upheld a fee award of 33% of the common fund and stated an award of 33% "is within a historical range of 20 to 50 percent of a common fund." 1 Cal. 5th at 487.

Accordingly, an award of 20% - 23% of the benefit conferred in this case is within the range for class action fees and further confirms that the fees sought are reasonable and should be approved by the Court.

#### C. Plaintiff's Counsel Are Entitled to Reimbursement of Litigation Expenses

Litigation expenses are reimbursable if the expenses "would typically be billed to paying clients in non-contingency matters." *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1048 (N.D. Cal. 2007); *see also Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (same).

Here, Active will pay the \$20,694.46 in expenses sought by Plaintiff's Counsel, if approved by the Court.

Further, all expenses sought by Plaintiff's Counsel are types typically charged to paying clients in the marketplace and are also routinely reimbursed in class action settlements. For example, in *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007), the awarded expenses included: "1) meals, hotels, and transportation; 2) photocopies; 3) postage, telephone, and fax; 4) filing fees; 5) messenger and overnight delivery; 6) online legal research; 7) class action notices; 8) experts, consultants, and investigators; and 9) mediation fees."

Indeed, other than office overhead, "all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case" are subject to reimbursement. *In re Media Tech. Sec. Litig.*, 913 F. Supp. 1362, 1368 (N.D. Cal. 1995); *see also Hartless*, 273 F.R.D. at 645-46 (a common fund class action settlement where

1 court awarded litigation costs for consultants, online legal research, copying, postage, long  
2 distance charges, travel expenses, filing fees, mediation fees, and investigation fees).

3 Plaintiff's Counsel's out-of-pocket expenses are all types of expenses normally  
4 charged to paying clients, were all incurred in the course of this litigation, were necessary to  
5 the litigation, and are not included in the overhead of counsel's hourly rates. Hurst Decl.,  
6 ¶¶39-41; Lowey Decl., ¶17; Marchbanks Decl., ¶17.

7 As detailed in Plaintiff's Counsel's declarations, the expenses sought are for  
8 photocopies, filing fees, service of process, electronic document management, hearing  
9 transcripts and court reporters, overnight delivery, online legal research, and conference calls.  
10 *See id.*, ¶¶39-41; Lowey Decl., ¶17; Marchbanks Decl., ¶17.

## 11 **VII. The Service Award Should Be Approved**

12 It is appropriate to provide a payment to the named plaintiff for service to the class.  
13 *Cellphone*, 186 Cal. App. 4th at 1393-94. Plaintiffs who bear the risks and spend the time and  
14 effort necessary to litigate class matters "should be compensated for the expense or risk they  
15 have incurred in conferring a benefit on other members of the class." *Id.* at 1394 (quoting  
16 *Clark v. Am. Residential Servs. LLC*, 175 Cal. App. 4th 785, 806 (2009)). Service awards "are  
17 fairly typical in class action cases." *Rodriguez*, 563 F.3d at 958.

18 Here, Elena Boland has served the Class well. Plaintiff Boland replaced the prior  
19 named plaintiff on April 1, 2015, approximately one year after the original complaint was  
20 filed. ROA #66; Hurst Decl., ¶7. Throughout the duration of Plaintiff Boland's nearly two  
21 years as the named plaintiff, she was aware of Active's aggressive litigation approach, kept in  
22 constant communication with her counsel, and was fully prepared to be deposed and testify at  
23 trial. Marchbanks Decl., ¶12.

24 The requested service award of \$750 is modest and reasonable when compared to  
25 amounts awarded in other cases. *See, e.g., Cellphone*, 186 Cal. App. 4th at 1393, 1396  
26 (affirming \$10,000 service awards); *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal.  
27 App. 4th 399, 412 (2010) (affirming \$5,000 service awards).

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**VIII. Conclusion**

For the reasons stated above, Plaintiff respectfully requests that the Court grant final approval of the settlement as fair, reasonable, and adequate, certify the settlement class, award attorneys' fees and out-of-pocket expenses, and award a service award to Plaintiff.

Respectfully submitted,

Dated: January 4, 2017

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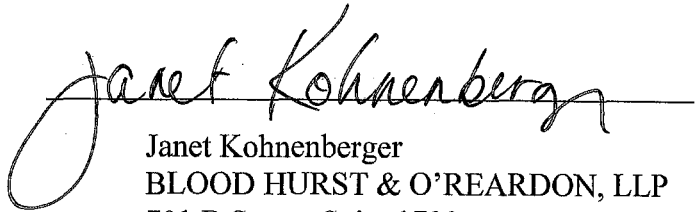
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**CERTIFICATE OF SERVICE**

*Christopher Weight v. The Active Network, Inc.*  
Case No. 37-2014-00004713-CU-MC-CTL

I hereby certify that on January 4, 2017, I electronically filed the foregoing with the Clerk of the Court using One Legal Online Court Services, and electronically served the foregoing upon the attorney of record for each party in this case at the e-mail address(es) registered for such service through One Legal Online Court Services. Parties may access this filing through the Court's website.

I certify under penalty of perjury that the foregoing is true and correct. Executed on January 4, 2017.



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