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12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION

16 CALI BUNN, individually and on behalf of
all others similarly situated,
17
Plaintiff,
18
v.
19
NIKE, INC., an Oregon corporation,
20
Defendant.

CASE NO. 20-cv-7403-YGR

**PLAINTIFF'S UNOPPOSED MOTION TO
APPROVE CLASS ACTION
SETTLEMENT FOR INJUNCTIVE
RELIEF AND TO APPROVE
ATTORNEYS' FEES, COSTS, AND A
SERVICE AWARD TO PLAINTIFF**

DATE: April 20, 2021
TIME: 2:00 p.m.
DEPT: Courtroom 1 – 4th Floor

Judge: Hon. Yvonne Gonzalez Rogers

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on April 20, 2021 at 2:00 p.m. in Courtroom 1 of the above-captioned Court, the Hon. Yvonne Gonzalez Rogers presiding, plaintiff Cali Bunn will move for (1) approval of a proposed class action settlement for injunctive relief, the terms of which are contained in the Settlement Agreement attached as Exhibit 1 to the Declaration of James F. Clapp, filed herewith; (2) certification pursuant to Fed. R. Civ. P. 23(b)(2) of the following settlement class: “All persons who are deaf or hard of hearing and who visited or attempted to visit a [Nike retail] Store in California from June 18, 2020 to the date the Court issues the Final Approval Order for this settlement”; (3) approval of Class Counsel’s attorneys’ fees and costs in the total amount of \$85,000; and (4) approval of a service award to the named plaintiff in the amount of \$5,000.¹

As discussed in the attached Memorandum of Points and Authorities, the proposed settlement is fair, reasonable, and adequate under the factors set forth in Fed. R. Civ. P. 23(e). Moreover, the settlement class is properly certified under Rule 23(b)(2) because the class alleges defendant Nike, Inc. “has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” *Id.* For the reasons set forth in the attached memorandum, this Rule 23(b)(2) settlement does not require a two-step approval process or class notice.

Class Counsel’s request for fees and costs totaling \$85,000 should be approved since it represents just 49% of their actual lodestar amount. The \$5,000 service award to plaintiff Cali Bunn is reasonable in light of the time she spent, and the risk she undertook, in bringing this lawsuit on behalf of the class.

This motion is based on this Notice, the attached Memorandum of Points and Authorities, the declarations of Michael Rubin and James F. Clapp, the Settlement

¹ Pursuant to 28 U.S.C. § 1715(d), the Court cannot order final approval until at least 90 days have elapsed after defendant served notice of this settlement on the appropriate federal and state officials pursuant to Section 1715(b). Nike served the required notices on January 14, 2021 and will be filing proof of compliance with this notice requirement. Thus, the final approval order cannot be entered before April 13, 2021 to comply with the CAFA notice requirement.

1 Agreement attached as Exhibit 1 to the Clapp Decl., the pleadings filed in this action, and on
2 such further evidence and argument as may be presented at the hearing.

3 Dated: January 26, 2021

CLAPP & LAUNGER LLP

4
5 /s/ James F. Clapp

JAMES F. CLAPP

MARITA MURPHY LAUNGER

7 MICHAEL RUBIN

EVE H. CERVANTEZ

8 ALTSHULER BERZON LLP

9 Attorneys for Plaintiff

CALI BUNN

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Cali Bunn, a 22-year-old college student who is deaf, filed this lawsuit against
4 defendant Nike, Inc. to address an important but overlooked pandemic-related problem that
5 has affected millions of Californians who are deaf or hard of hearing.

6 In response to the COVID-19 pandemic, Nike—like virtually all other retailers and
7 customer-facing businesses in California—instituted a policy requiring all of its employees to
8 wear face coverings when interacting with customers. Plaintiff agrees that face coverings are
9 necessary to protect public health, but plaintiff alleges Nike has implemented its policy in a
10 way that discriminates against people who are deaf or hard of hearing. Specifically, Nike
11 permits its employees to wear *opaque* face masks while interacting with customers. Not only
12 do opaque masks muffle sound, but they also block visualization of the wearer’s mouth and
13 facial expressions, which people with hearing loss rely on to understand speech.²

14 Under federal and state law, plaintiff contends Nike has a duty to provide auxiliary
15 aids or other reasonable accommodations to customers who are deaf or hard of hearing to
16 ensure they can communicate effectively with Nike’s employees. *See* 42 U.S.C. §
17 12182(b)(1)(A)(1) (denying “goods, services, facilities, privileges, advantages, or
18 accommodations” to a person with a disability violates the Americans with Disabilities Act);
19 28 C.F.R. § 36.303(a) (public accommodation has duty to provide “auxiliary aids and
20 services” to ensure effective communication). Plaintiff alleges Nike has failed to
21 accommodate customers who are deaf or hard of hearing and who have been adversely
22 affected by its mandatory face covering policy.

23 After several months of investigation, consultation with experts, and arm’s-length
24 negotiations, plaintiff and Nike have reached a proposed class action settlement that provides
25 immediate and meaningful injunctive relief to the thousands of deaf or hard of hearing

26 _____
27 ² *See, e.g.*, “For the Deaf, Social Distancing Can Mean Social Isolation,” *The New York*
28 *Times*, June 4, 2020 (<https://www.nytimes.com/2020/06/04/us/coronavirus-deaf-culture-challenges.html>) (explaining that face masks are a barrier to communication for individuals who are deaf or hard of hearing).

1 customers who will visit Nike’s retail stores in California while Nike’s face covering policy
2 remains in effect. As discussed in more detail below, the settlement requires Nike to:
3 (1) provide guidance and communications to its California store employees to accommodate
4 customers who are having difficulty communicating due to an employee wearing an opaque
5 face covering; (2) post notices at California store entrances informing customers that
6 accommodations are available for customers with hearing loss; and (3) provide its California
7 stores with transparent face masks and clean pen-and-paper sets in case a customer requests
8 an accommodation. The proposed settlement agreement requires Nike to come into
9 compliance with these requirements no later than January 22, 2021 (14 days after the
10 settlement was executed) and, subject to Court approval of this settlement, to continue to
11 provide this relief for as long as its face covering policy remains in effect.

12 The proposed settlement addresses and resolves injunctive relief claims only. Apart
13 from plaintiff Bunn, it *does not release* or otherwise limit any class member’s potential claim
14 against Nike for compensatory damages, statutory damages, punitive damages, or any other
15 form of monetary relief in any proceeding that may be brought in the future.

16 For the reasons discussed below, the Court should certify the proposed injunctive
17 relief class pursuant to Fed. R. Civ. P. 23(b)(2) and approve the settlement. As this Court
18 held in *Stathakos v. Columbia Sportswear Co.*, 2018 U.S. Dist. LEXIS 17138, at *7-8 (N.D.
19 Cal. Jan. 25, 2018), when a class action settlement provides for injunctive relief only and
20 expressly preserves the class members’ rights to bring claims for monetary relief—as in this
21 case—class notice is not required. Accordingly, there is no need for the Court to
22 “preliminarily approve” the settlement, issue notice, and then hold a final approval hearing.
23 Rather, the Court can grant final approval to the parties’ agreed-upon settlement without
24 undertaking the two-step approval process that is typically followed in Rule 23(b)(3) class
25 actions.

26 In addition, under paragraphs 42-43 of the Settlement Agreement, Nike has agreed to
27 pay up to \$85,000 for Class Counsel’s court-approved attorneys’ fees and costs and up to
28 \$5,000 for a Court-approved service award to plaintiff. Those amounts are reasonable and

1 should also be approved. The requested fee represents just 49% of Class Counsel’s actual
2 lodestar amount, and the \$5,000 service award is in line with awards in similar class action
3 cases in this District and is justified in light of plaintiff’s service to the class.

4 Pursuant to 28 U.S.C. § 1715(b), Nike is required to provide notice of this settlement
5 to the attorneys general of the United States and the State of California no later than 10 days
6 after the filing of this motion. Under Section 1715(d), this Court may not issue an order
7 granting final approval until 90 days have elapsed following Nike’s service of the notices.
8 Nike served the required notices on January 13, 2021 and will file proof of its compliance
9 with Section 1715(b). Thus, the final approval order cannot be entered before April 13, 2021
10 to comply with the CAFA notice requirement.

11 **II. STATEMENT OF RELEVANT FACTS**

12 On July 12, 2020, plaintiff visited a Nike retail store in San Diego, California. One
13 month prior, Nike had instituted a statewide policy requiring all of its retail store employees
14 to wear face coverings, as required by state mandate to reduce the spread of COVID-19.
15 Upon entering the Nike store, plaintiff attempted to ask a Nike employee for assistance to
16 help her locate a pair of shoes. However, plaintiff was unable to communicate with the
17 employee because he was wearing a Nike-mandated opaque face mask, which muffled his
18 speech and prevented plaintiff from reading his lips. Plaintiff alleges that although she told
19 the employee she could not understand him because of his mask, the employee failed to offer
20 plaintiff any type of reasonable accommodation—which might have included, for example,
21 donning a transparent face mask or offering to communicate with plaintiff in writing.

22 Complaint ¶¶ 10-12.

23 On September 22, 2020, plaintiff filed a putative class action lawsuit against Nike in
24 the San Francisco County Superior Court. Plaintiff’s complaint alleged three claims for
25 relief: (1) violation of Title III of the Americans with Disabilities Act (42 U.S.C. §§ 12181 *et*
26 *seq.*); (2) violation of California’s Unruh Civil Rights Act (Cal. Civ. Code §§ 51 *et seq.*); and
27 (3) violation of the California Disabled Persons Act (Cal. Civ. Code §§ 54 *et seq.*). On
28 October 22, 2020, Nike removed the lawsuit to this Court.

1 The parties immediately commenced settlement negotiations. Plaintiff’s counsel,
 2 Michael Rubin and Eve Cervantez of Altshuler Berzon LLP and James F. Clapp of Clapp &
 3 Lauinger LLP, are experienced class action attorneys who have handled numerous civil
 4 rights and disability discrimination cases. Declaration of Michael Rubin, ¶¶ 4, 6; Declaration
 5 of James F. Clapp, ¶ 2. Before commencing settlement discussions, plaintiff’s counsel
 6 visited seven Nike retail stores to confirm that Nike’s policies are uniform throughout the
 7 state. Plaintiff’s counsel also retained an expert witness to investigate and evaluate the types
 8 of reasonable accommodations Nike could have provided to plaintiff. Clapp Decl. ¶ 3.

9 After more than two months of negotiations, the parties on January 8, 2021 signed the
 10 Settlement Agreement (“Agreement”) attached as Exhibit 1 to the Clapp Decl. Under the
 11 Agreement, the parties have stipulated to certification of the following Settlement Class
 12 pursuant to Fed. R. Civ. P. 23(b)(2): “All persons who are deaf or hard of hearing and who
 13 visited or attempted to visit a [Nike retail] Store in California from June 18, 2020 to the date
 14 the Court issues the Final Approval Order for this settlement.” Agreement ¶ 20.³

15 Consistent with Rule 23(b)(2), the classwide relief provided by the parties’ settlement
 16 is *non-monetary* in nature. That relief requires Nike, no later than January 22, 2021, to
 17 implement the following practices in its California stores and to maintain those practices in
 18 effect throughout the time Nike maintains its mandatory face covering policy:

19 1. Nike will make available to each Nike retail store in California (“Store”) a
 20 sufficient number of masks with transparent windows over the mouth area to enable those
 21 Stores’ employees, without unreasonable delay, to obtain and use transparent-window masks
 22 during conversations with customers who are deaf or hard of hearing who indicate they

23 _____
 24 ³ The Complaint defined the class as “[A]ll individuals in California who are deaf or hard of
 25 hearing” and also defined a “statutory damages Subclass” as “[A]ll Class members who,
 26 since the onset of the COVID-19 pandemic and Nike’s implementation of its mandatory
 27 mask-wearing policy, shopped or desired to shop at a Nike retail store in California whose
 28 customer-interacting employees wore opaque face masks.” Complaint ¶ 10. The Agreement
 correctly narrows the class definition to deaf or hard of hearing persons *who visited or
 attempted to visit a Nike store*. The Agreement also eliminates the statutory damages
 subclass because, as discussed below, the settlement provides only injunctive relief and
 preserves the right of any class member to seek monetary relief in a subsequent individual or
 class action.

1 prefer to communicate through speechreading; and Nike shall replenish the supply of such
2 masks as reasonably necessary. Plaintiff's counsel have inspected and approved the
3 transparent mask Nike intends to use. Agreement ¶ 22(a); Clapp Decl. ¶ 5.

4 2. Nike will make available clean pens and paper at each Store to facilitate the
5 exchange of notes with customers who are deaf or hard of hearing and indicate they prefer to
6 communicate in writing. Agreement ¶ 22(b).

7 3. Nike will provide guidance and communications to employees working in Stores
8 regarding how to accommodate customers who are deaf or hard of hearing and regarding the
9 availability and proper usage of the transparent masks and clean pens and paper with such
10 customers. Agreement ¶ 22(c).

11 4. Nike will post notices near the entrances of Stores to advise customers who are
12 deaf or hard of hearing that they may ask a Store employee for additional assistance, which
13 might include having the employee don a transparent face mask or communicate with the
14 customer in writing. Plaintiff's counsel have reviewed and approved the content of the
15 postings. Agreement ¶ 22(d); Clapp Decl. ¶ 5.

16 In addition, Nike has agreed to reimburse plaintiff's counsel's court-approved
17 attorneys' fees and costs up to \$85,000 and will pay a court-approved service award to
18 plaintiff not to exceed \$5,000. Agreement ¶¶ 42-43. The settlement is not contingent on the
19 Court awarding either of these amounts. Agreement ¶ 44.

20 In exchange, Nike will receive a release of all *non-monetary* claims that were alleged
21 or could have been alleged based on the allegation in the Complaint that Nike's policy of
22 requiring its employees to wear face coverings discriminated against members of the
23 Settlement Class. In addition, plaintiff Bunn will give Nike a general release, which
24 encompasses her claims for damages and statutory penalties (which, under the Unruh Act,
25 are \$4,000 per violation). Agreement ¶¶ 16, 29-31.

26 The Agreement does not limit or otherwise affect any Settlement Class member's
27 right to assert claims for monetary relief against Nike, now or in the future. Paragraph 16 of
28 the Agreement expressly states: "With respect to Class Members other than Plaintiff Class

1 Representative, Released Claims shall not include any claim for damages, penalties, or other
 2 forms of monetary relief, or any claim for attorneys' fees or costs arising therefrom, the
 3 Settlement Class members had, have, or may have in the future against any of the Releasees.”
 4 Agreement ¶ 16.

5 **III. NOTICE IS NOT REQUIRED FOR THIS RULE 23(B)(2) INJUNCTIVE**
 6 **RELIEF SETTLEMENT**

7 Fed. R. Civ P. 23(c)(2) states: “For any class certified under Rule 23(b)(1) or (b)(2),
 8 the court *may* direct appropriate notice to the class.” Fed. R. Civ. P. 23(c)(2) (emphasis
 9 added). Because this language is permissive rather than mandatory, classwide notice is not
 10 required in Rule 23(b)(2) class actions, in part because class members do not have the right
 11 to opt out. *Stathakos*, 2018 U.S. Dist. LEXIS 17138, at *7-8 (holding that notice and opt out
 12 were not required for a Rule 23(b)(2) settlement); *Lilly v. Jamba Juice Co.*, 2015 U.S. Dist.
 13 LEXIS 34498, at *25-26 (N.D. Cal. Mar. 18, 2015) (holding that because the settlement class
 14 members would not have the right to opt out from the injunctive settlement and because the
 15 settlement does not release the monetary claims of class members, class notice is not
 16 necessary); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558, 180 L. Ed. 2d
 17 374 (2011) (Rule 23 “provides no opportunity for (b)(1) or (b)(2) class members to opt out,
 18 and does not even oblige the District Court to afford them notice of the action.”).

19 Federal courts in other districts have uniformly held that notice is not required in Rule
 20 23(b)(2) class action settlements. *Jermyn v. Best Buy Stores*, 2012 U.S. Dist. LEXIS 90289,
 21 at *32 (S.D.N.Y. June 27, 2012) (“Because this injunctive settlement specifically preserves
 22 and does not release class members’ monetary claims, notice to class members is not
 23 required”); *Green v. Am. Express Co.*, 200 F.R.D. 211, 212-13 (S.D.N.Y. 2001) (no notice is
 24 required under several circumstances, such as “when the settlement provides for only
 25 injunctive relief, and therefore, there is no potential for the named plaintiffs to benefit at the
 26 expense of the rest of the class”); *Penland v. Warren Cnty. Jail*, 797 F.2d 332, 334 (6th Cir.
 27 1986) (“this court has specifically held that notice to class members is not required in all
 28 F.R.C.P. 23(b)(2) class actions”); *DL v. District of Columbia*, Case No. 05-cv-1437, 302

1 F.R.D. 1, 2013 U.S. Dist. LEXIS 160018 at *17 (D.D.C. Nov. 8, 2013) (“the district courts
 2 within these circuits that have directly considered the issue have applied the requirement
 3 ‘more flexibly in situations where individual notice to class members is not required, such as
 4 suits for equitable relief”); *Lingquist v. Bowen*, 633 F. Supp. 846, 862 (W.D. Mo. Jan 31,
 5 1986) (“When a class is certified pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure,
 6 notice to the class members is not required.”) (internal citations omitted); *Mamula v.*
 7 *Satralloy, Inc.*, 578 F. Supp. 563, 572 (S.D. Ohio Sep. 7, 1983) (“This Court has certified this
 8 action as a class action under Rule 23(b)(2), and, as such, notice to class members is not
 9 required under Rule 23(c)(2)”).

10 Here, the Agreement provides for injunctive relief only and preserves the rights of
 11 Settlement Class members to bring claims for monetary relief. Agreement ¶ 16. Further,
 12 even if notice were sent, class members would not have the right to opt out. *See Lilly*, 2015
 13 U.S. Dist. LEXIS 34498, at *25-26. Therefore, class notice would not serve any purpose and
 14 is not required.

15 **IV. THE SETTLEMENT MEETS THE STANDARD FOR APPROVAL UNDER**
 16 **FED. R. CIV. P. 23(e)**

17 Class actions may be settled only with the court’s approval, and only after the court
 18 finds the settlement proposal to be “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2).
 19 In evaluating a settlement proposal, the district court must consider whether:

- 20 (A) the class representatives and class counsel have adequately
 21 represented the class;
 22 (B) the proposal was negotiated at arm’s length;
 23 (C) the relief provided for the class is adequate, taking into
 24 account:
 25 (i) the costs, risks, and delay of trial and appeal;
 26 (ii) the effectiveness of any proposed method of
 27 distributing relief to the class, including the method
 28 of processing class-member claims;
 (iii) the terms of any proposed award of attorney’s fees,
 including timing of payment; and
 (iv) any agreement required to be identified under Rule
 23(e)(3); and

1 (D) the proposal treats class members equitably relative to each
2 other.

3 Fed. R. Civ. P. 23(e)(2). Each of these factors weighs in favor of approval.

4 **A. Plaintiff and Class Counsel Adequately Represented the Class**

5 Adequacy of representation turns on two issues: (1) whether the plaintiff has any
6 conflicts of interests with other class members; and (2) whether the plaintiff and class
7 counsel have vigorously prosecuted the action on behalf of the class. *In re Mego Fin. Corp.*
8 *Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

9 First, there is no conflict of interest between plaintiff (or her counsel) and the
10 Settlement Class members because the injunctive relief provided by the settlement applies
11 equally to everyone. Further, plaintiff's request for an incentive award of up to \$5,000 is
12 consistent with recent awards in this District and does not undermine plaintiff's adequacy.

13 Second, plaintiff and her counsel have vigorously represented the class. Class
14 Counsel are highly qualified class action attorneys with specific experience in civil rights and
15 disability discrimination cases. Rubin Decl., ¶¶ 4, 6; Clapp Decl., ¶ 2. Class Counsel
16 thoroughly investigated the relevant facts, claims, and legal defenses before entering into
17 settlement negotiations with Nike. Formal discovery was not necessary because the key
18 issue in the case—Nike's policy and practice of requiring its California employees to wear
19 face coverings—was not in dispute. The parties were therefore able to discuss the reasons
20 for Nike's policy, the applicable law, and the needs of the settlement class without needing to
21 resort to drawn-out, expensive litigation. Clapp Decl. ¶ 3.

22 **B. The Settlement Was Negotiated at Arm's Length**

23 The settlement negotiations, while cordial, were at all times adversarial, non-collusive
24 and conducted at arm's-length. The parties exchanged numerous offers and counteroffers,
25 and the proposed settlement represents the "last, best and final" offer by both sides. Clapp
26 Decl. ¶ 4. Because the parties' attorneys are very experienced in this area of law, there was
27 no need to engage an independent mediator, and a mediation would have only delayed
28 resolution of the case as well as the implementation of the injunctive relief.

1 **C. The Relief Provided by the Settlement Is Adequate**

2 The injunctive relief provided in the Settlement Agreement is substantial and
3 represents a reasonable compromise between Nike’s need to protect the health and safety of
4 its employees and its legal duty, as a public accommodation, to ensure that customers who
5 are deaf or hard of hearing are able to communicate effectively. All Settlement Class
6 members will benefit from the injunctive relief and will be notified about their right to access
7 accommodations through signage posted at every California Nike store (the text, graphics,
8 and placement of which were also the subject of extensive negotiations). Additionally, to
9 ensure the Settlement Class will receive the benefits of the injunctive relief quickly, Nike
10 agreed to implement that relief within 14 days of the execution of the Settlement Agreement.
11 Agreement ¶ 22. This is significant because if this case were to be litigated through trial and
12 potential appeal, it would take several months or years for the class to receive injunctive
13 relief (if at all), and by that time, the pandemic—and the need for injunctive relief—would
14 hopefully be long over.

15 Approval of a class settlement is appropriate when plaintiffs must overcome
16 significant barriers to prove their case. *Chun–Hoon v. McKee Foods Corp.*, 716 F.Supp.2d
17 848, 851 (N.D.Cal.2010). Generally, “fact-intensive inquiries and developing case law
18 present significant risks to Plaintiffs’ claims and potential recovery.” *In re Wells Fargo Loan*
19 *Processor Overtime Pay Litig.*, 2011 U.S. Dist. LEXIS 84541, at *16 (N.D. Cal. Aug. 2,
20 2011). Nike’s potential liability in this case would hinge on factual and legal determinations
21 of whether Nike was providing adequate accommodations to customers who are deaf or hard
22 of hearing while at the same time requiring employees to wear face coverings to help prevent
23 the spread of COVID-19. There are no published cases addressing this factual scenario,
24 which presents uncertainty. While plaintiff believes she would prevail on the merits, she also
25 faced a significant risk of non-recovery in this case. *See Lilly v. Jamba Juice Co.*, 2015 U.S.
26 Dist. LEXIS 34498, at *22 (N.D. Cal. May 4, 2015) (uncertainty of recovery weighs in favor
27 of approval).
28

1 As noted above, apart from plaintiff Bunn, the proposed settlement does not limit or
 2 otherwise affect the right of any class member to seek monetary recovery against Nike based
 3 on its mandatory face-covering policy. Accordingly, there is no need for the Court to
 4 evaluate what Nike’s potential monetary exposure might have been had plaintiff prevailed.⁴
 5 Settling for injunctive relief for the class now, while the need for such relief is immediate and
 6 while preserving class members’ ability to seek monetary damages if they so choose, is a
 7 practical and reasonable compromise that is highly beneficial to the class.

8 Finally, as explained below, Class Counsel’s request for \$85,000 in fees and costs
 9 represents just 49% of their actual lodestar, and the requested \$5,000 service award is in line
 10 with recent awards in this District. There are no undisclosed agreements between the parties
 11 or their counsel. Clapp Decl. ¶ 4.

12 **D. The Settlement Treats Class Members Equally**

13 As noted above, all Settlement Class members will benefit equally from the proposed
 14 injunctive relief.

15 **V. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS PURSUANT**
 16 **TO FED. R. CIV. P. 23(B)(2)**

17 Under Fed. R. Civ. P. 23(a), a class action is proper if: “(1) the class is so numerous
 18 that joinder of all members is impracticable; (2) there are questions of law or fact common to
 19 the class; (3) the claims or defenses of the representative parties are typical of the claims or
 20 defenses of the class; and (4) the representative parties will fairly and adequately protect the
 21 interests of the class.” *Id.*

22 Each Rule 23(a) requirement is satisfied here. First, courts find “numerosity” when
 23 the class consists of at least 40 members. *EEOC v. Kovacevich “5” Farms*, 2007 U.S. Dist.
 24 LEXIS 32330 at *57, 100 Fair Empl. Prac. Cas. (BNA) 944, (E.D. Cal. Apr. 19, 2007);
 25 *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2nd Cir. 1995)

26
 27 ⁴ The Unruh Civil Rights Act imposes statutory damages of no less than \$4,000 per
 28 violation, and the California Disabled Persons Act carries statutory damages of \$1,000 per
 violation. Cal. Civ. Code §§ 52.1(f), 54.3(a).

1 (numerosity presumed when class is comprised of 40 members). Although the parties do not
2 know the precise number of persons with hearing disabilities who have visited or attempted
3 to visit a Nike store in California since the pandemic began, according to one study up to 5%
4 of the U.S. population is deaf or hard of hearing.⁵ Since Nike operates 38 retail stores in
5 California, which have served thousands of customers since the pandemic began, it is
6 reasonable to assume the class consists of far more than 40 members. Second, there are
7 questions of law and fact common to the class, including (1) whether a customer who is deaf
8 or hard of hearing can state a claim for disability discrimination based on a policy adopted in
9 response to a public health crisis; and (2) whether opaque face masks are in fact a barrier to
10 communication for people who are deaf or hard of hearing. Third, plaintiff's claim is typical
11 of those of the other class members because plaintiff, like other Settlement Class members,
12 visited a Nike store in California and claims she experienced communication difficulties and
13 was denied service due to Nike's mandatory face covering policy. Fourth, as discussed
14 above, plaintiff has no conflicts of interest with other members of the class, and her attorneys
15 are well-qualified to handle this lawsuit.

16 Class certification is appropriate under Fed. R. Civ. P. 23(b)(2) when "the party
17 opposing the class has acted or refused to act on grounds that apply generally to the class, so
18 that final injunctive relief or corresponding declaratory relief is appropriate respecting the
19 class as a whole." *Id.* "[C]ivil rights cases against parties charged with unlawful, class-based
20 discrimination are prime examples" of cases that are appropriate for Rule 23(b)(2)
21 certification. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Courts in this
22 District routinely certify disability discrimination claims under Rule 23(b)(2). *See, e.g.,*
23 *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 612-13 (N.D. Cal. 2004); *Arnold v. UA Theatre*
24 *Circuit, Inc.*, 158 F.R.D. 439, 461-62 (N.D. Cal. 1994).

25
26
27 ⁵ Mitchell, R., "How many deaf people are there in the United States? Estimates from the
28 Survey of Income and Program Participation," *Journal of Deaf Studies and Deaf Education*,
Vol 11(1):112-9, Winter 2006.

1 Here, it is undisputed that Nike has a uniform policy requiring its retail employees in
2 California to wear face coverings, and the alleged harm to deaf and hard of hearing
3 customers arises from this uniform policy. Moreover, as noted above, plaintiff is an adequate
4 class representative, she has no conflicts of interest, and her attorneys are well-qualified.
5 Certification for settlement purposes is therefore appropriate under Rule 23(b)(2).

6 **VI. THE COURT SHOULD AWARD THE REQUESTED FEES AND COSTS**

7 **A. The Court Should Apply the Lodestar Method**

8 “Attorneys’ fees provisions included in proposed class action settlement agreements
9 are, like every other aspect of such agreements, subject to the determination whether the
10 settlement is ‘fundamentally fair, adequate, and reasonable.’” *Staton v. Boeing Co.*, 327 F.3d
11 938, 963 (9th Cir. 2003) (citing Fed. R. Civ. P. 23(e)). Even where the defendant “agrees to
12 pay the fees independently of any monetary award or injunctive relief provided to the class,”
13 the Court must ensure that the fees requested are reasonable. *Id.* at 964.

14 The federal and state statutes pleaded by plaintiff in her Complaint each contain a fee-
15 shifting provision. *See* 42 U.S.C. § 12205; Cal. Civ. Code § 55. In cases arising under
16 statutory fee-shifting statutes, the reasonableness of the fees requested is properly measured
17 using the “lodestar method”—i.e., by “multiplying the number of hours the prevailing party
18 reasonably expended on the litigation by a reasonable hourly rate, and, if circumstances
19 warrant, adjusting the lodestar to account for other factors which are not subsumed within it.”
20 *Staton*, 327 F.3d at 965 (citations and alterations omitted); *Hanlon v. Chrysler Corp.*, 150
21 F.3d 1011, 1029 (“In employment, civil rights and other injunctive relief class actions, courts
22 often use a lodestar calculation because there is no way to gauge the net value of the
23 settlement or any percentage thereof.”). Moreover, since two of plaintiff’s three claims are
24 based on California law, the Court is permitted to apply a multiplier to the lodestar amount to
25 compensate Class Counsel for the results they achieved, the quality of their representation,
26 and their contingency risk. *Laffitte v. Robert Half Int’l, Inc.*, 1 Cal.5th 480, 489 (2016).

B. Plaintiff's Fees Request Reflects a Significant Downward Adjustment of Class Counsel's Lodestar, Is Reasonable, and Should Be Awarded

Class Counsel request a total of \$85,000 in attorneys' fees and costs. Class Counsel's actual lodestar is \$170,517.50, and they have incurred \$1,581.16 in recoverable costs. Thus, the requested fee of \$83,418.84 (\$85,000 - \$1,581.16) represents just 49% of counsel's actual lodestar amount.

The lodestar is determined by "multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Staton*, 327 F.3d at 965. Class Counsel devoted more than 186.7 hours to this litigation since its inception in July 2020. Rubin Decl. ¶ 9; Clapp Decl. ¶ 7. This time was spent on numerous essential litigation tasks, including: (1) conducting pre-filing investigation, including legal research, witness interviews, and site visits; (2) drafting the complaint; (3) researching and retaining experts to opine on Nike's alleged liability and possible reasonable accommodations; (4) conducting settlement negotiations; (5) drafting and editing the Settlement Agreement; and (6) drafting the motion for final approval. Rubin Decl. ¶ 12; Clapp Decl. ¶ 7. These hours were reasonably expended in litigating this case and provide a proper basis for calculating Class Counsel's lodestar. *Id.* In addition, Class Counsel expect to spend at least 10 additional hours finalizing the settlement and ensuring Nike complies with its terms. *Id.*

The rates used by Class Counsel to calculate their lodestar reflect "the prevailing market rates in the relevant community" for attorneys of like skill, experience, and ability. *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *see also* Rubin Decl. ¶¶ 8-9; Clapp Decl. ¶ 6.⁶ Class Counsel's experience, reputation, and ability more than justify the hourly rates used in calculating counsel's lodestar (which are their current rates for commercial clients). Rubin Decl. ¶ 9; Clapp Decl. ¶ 6.

⁶ Courts typically apply each attorney's current hourly rate, rather than the rate that applied at the time work was performed, in order to account for the delay in payment of attorneys' fees. *See Missouri v. Jenkins*, 491 U.S. 274, 282-84 (1989) (court should account for delay in payment by applying current rather than historic hourly rates); *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 453-54 (9th Cir. 2010).

1 Using the reasonable hours and rates set forth in the Rubin and Clapp declarations,
 2 Class Counsel’s total lodestar in this matter is \$170,517.50. Yet plaintiffs ask this Court to
 3 award a total of only \$85,000 for all fees *and costs* counsel have incurred and will incur in
 4 connection with this case. The fact that counsel seek to recover only 49% of their lodestar
 5 even though they would reasonably be entitled to their entire lodestar times a multiplier
 6 (*Laffite*, 1 Cal.5th at 489) underscores the reasonableness of the requested fee award. *See*,
 7 *e.g.*, *G.F. v. Contra Costa Cty.*, 2015 U.S. Dist. LEXIS 159597, at *48 (N.D. Cal. Nov. 25,
 8 2015) (finding fees request arising from class action settlement reasonable where the amount
 9 requested “is significantly less than what these attorneys might otherwise be entitled to under
 10 the lodestar analysis”).

11 **C. Class Counsel Are Entitled to Recover Their Reasonable Litigation Costs**
 12 **and Expenses, Which Have Benefitted the Class**

13 Class Counsel also request reimbursement for the litigation costs they reasonably
 14 incurred while litigating this matter, totaling \$1,581.60. *See* Rubin Decl. ¶ 13; Clapp Decl. ¶
 15 8. The costs are detailed in the supporting declarations of Class Counsel and are the normal
 16 costs of litigation that are traditionally billed to paying clients. Rubin Decl. ¶ 13; Clapp Decl.
 17 ¶ 8; *see, e.g., Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (holding that attorneys
 18 should recover reasonable out-of-pocket costs of the type ordinarily billed to paying clients);
 19 *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). As such, the costs should
 20 be approved.

21 **VII. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARD**

22 Class Counsel request that the Court authorize a service award to the named plaintiff
 23 Cali Bunn in the amount of \$5,000. The requested enhancement is reasonable in view of the
 24 time plaintiff devoted to the litigation, the reputational and financial risk she undertook, and
 25 the substantial benefit her efforts ultimately conferred to Nike’s deaf and hard of hearing
 26 customers in California.

27 Plaintiff spent many hours communicating with Class Counsel while they
 28 investigated the facts and drafted the complaint. Clapp Decl. ¶ 9. During settlement

1 negotiations, plaintiff was informed of each offer and counteroffer and provided valuable
 2 insight into what type of accommodations deaf and hard of hearing customers might want
 3 from a retailer like Nike. *Id.* Plaintiff faced a financial risk in bringing this case because her
 4 claim is novel, and if Nike had prevailed it likely would have sought to recover its litigation
 5 costs from plaintiff. Finally, plaintiff is providing Nike a general release of her claims,
 6 including any claims for statutory damages under the Unruh Act (\$4,000 per violation) and
 7 the California Disabled Persons Act (\$1,000 per violation). Agreement ¶¶ 16, 29-31.

8 There is ample case law finding \$5,000 to be a reasonable amount for a service
 9 award. *See e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 at 463 (approving service
 10 awards of \$5,000 to the two class representatives); *Hopson v. Hanesbrands, Inc.*, 2009 U.S.
 11 Dist. LEXIS 33900, *27-28 (N.D. Cal. April 3, 2009) (finding \$5,000 service award to sole
 12 named plaintiff reasonable); *Jones v. Cal State Auto Ass'n*, 2009 U.S. Dist. LEXIS 101586,
 13 *14 (N.D. Cal. Oct. 27, 2009) (in the Northern District of California, a \$5,000 service award
 14 is “presumptively reasonable”). The service award should be approved.

15 **VIII. CONCLUSION**

16 For the foregoing reasons, the Court should approve the proposed settlement, certify
 17 the Settlement Class pursuant to Rule 23(b)(2), and approve the proposed attorneys’ fees,
 18 costs, and service award. However, in order to comply with 28 U.S.C. § 1715(d), the Court
 19 should not enter its order until April 13, 2021.

20 Dated: January 26, 2021

CLAPP & LAUNGER LLP

21
 22 /s/ James F. Clapp
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