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10 UNITED STATES DISTRICT COURT
11 DISTRICT OF ARIZONA

12 In re:
13 Arizona THERANOS, INC. Litigation,

No. 2:16-cv-2138- DGC

(Consolidated with)
No. 2:16-cv-2373- HRH
No. 2:16-cv-2660- HRH
No. 2:16-cv-2775- DGC
-and-
No. 2:16-cv-3599- DGC

**CORRECTED: PLAINTIFFS’
NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT**

Hearing: February 6, 2024 at 1:00 p.m.

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2023, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

s/ Alison E. Chase

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-and-
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**PLAINTIFFS’ MEMORANDUM IN
SUPPORT OF MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENTS**

Hearing: February 6, 2024 at 1:00 p.m.

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I. INTRODUCTION

1
2 Plaintiff Class Representatives, on behalf of themselves and the certified Class
3 (“Plaintiffs”), seek final approval of their settlements with Defendants Walgreens Boots
4 Alliance, Inc. and Walgreens Arizona Drug Co. (together, “Walgreens”) (the “Walgreens
5 Settlement”); Ramesh (“Sunny”) Balwani (the “Balwani Settlement”); and Theranos
6 (assignment for the benefit of creditors), LLC (“Theranos ABC”), the entity that holds the
7 remaining assets of the now-dissolved Theranos, Inc. (the “Theranos ABC Agreement”)
8 (collectively the “Settlements”). The Walgreens Settlement creates a non-reversionary
9 common fund of \$44 million, while the Balwani Settlement and the ABC Agreement will
10 result in an additional \$1,331,094.88 for distribution to the Class.

11 This Court granted preliminary approval of the Settlements on October 10, 2023.
12 After thoroughly reviewing the Settlement Agreements, the Motion for Preliminary
13 Approval and all related exhibits and papers, Plaintiffs’ Supplemental Memorandum in
14 Support of Preliminary Approval and evidence submitted therewith (which included
15 declarations from both Plaintiffs’ database expert, Arthur Olsen, and the Notice
16 Administrator) (“Supplemental Memorandum”), and the proposed forms of class notice and
17 proposed notice plan, the Court found that it was likely to find the Settlements were fair,
18 reasonable, and adequate under Fed. R. Civ. P. 23(e)(1), considering the costs, risks, and
19 delay of trial and appeal, the legal issues presented in this Action, the interests of the Class
20 Members, and the proposed method of distributing payments (Dkt. 601 at 3).

21 Plaintiffs now respectfully request that the Court grant final approval of the
22 Settlements. The Settlements are procedurally fair. They were reached only after years of
23 litigation and extensive discovery, and are the product of well-informed, arms-length
24 bargaining by experienced counsel on both sides. The Walgreens Settlement resulted from a
25 mediation with one of the nation’s preeminent neutrals, Ret. U.S. District Judge Layn
26 Phillips. The Settlements are also substantively fair, providing Class Members with
27 approximately double their unreimbursed out-of-pocket Theranos testing costs, and
28 substantial additional payments (estimated at approximately \$1,000) for members of the

1 Walgreens Edison Subclass for their battery claims, while avoiding the substantial risks and
2 delays of further litigation. The robust notice program approved and directed by the Court
3 has commenced and is on schedule to be successfully implemented. And finally, the Plan of
4 Allocation, pursuant to which Class Members will receive their settlement payments directly
5 without a claims process, provides for a fair and effective means of distributing the
6 settlement proceeds to the Class.

7 Therefore, Plaintiffs respectfully request that this Court grant final approval of the
8 Walgreens Settlement, Balwani Settlement and ABC Agreement, and enter a final judgment,
9 so that the Class can receive the substantial benefits provided by these agreements, after
10 nearly seven long years of active litigation. This Memorandum is filed concurrently with
11 Plaintiffs' Motion for Attorneys' Fees and Expenses, and Class Representative Service
12 Awards ("Fees and Service Awards Motion"), and supported by the Declaration of Jennifer
13 Keough ("Keough Declaration"), the Declaration of Roger Heller and Gretchen Freeman
14 Cappio in Support of Plaintiffs' Motion for Final Approval of Class Action Settlements and
15 Motion for Attorneys' Fees and Expenses and Service Awards ("Heller/Cappio
16 Declaration"), and the Exhibits attached thereto.

17 **II. BACKGROUND**

18 **A. Litigation and Procedural History**

19 Because the Court is familiar with the background of this litigation, Plaintiffs provide
20 the following as an overview of the roughly seven-year path of this case. The history of this
21 litigation is also set forth in detail in the Heller/Cappio Declaration. Briefly stated, this case
22 has spanned 12 distinct phases over the course of nearly seven years, including extensive
23 motions practice, appellate proceedings, and intensive discovery and other investigative
24 efforts up to and including preparation for trial, which was scheduled to begin not long after
25 the settlement in principle was reached with Walgreens.

26 **Stage 1, Pre-filing Investigation, Filing, Consolidation and Coordination (April**
27 **2016 – February 2017):** Theranos was once heralded as revolutionizing health care,
28 attracting substantial investment and a board of luminaries that included William

1 Perry (former U.S. Secretary of Defense), Henry Kissinger (former U.S. Secretary of State),
2 Gary Roughhead (Admiral, USN, retired), and Jim Mattis (General, USMC). In 2016,
3 Theranos was still selling patient testing in and outside of Walgreens stores. But, following
4 investigative reporting about potential fraud involving Theranos testing, pre-filing
5 investigations led to numerous putative class actions being filed, including in the Northern
6 District of California (where Theranos was headquartered and the first direct patient testing
7 occurred) and this District (where the majority of direct patient testing occurred). The
8 actions were consolidated before this Court, and Class Counsel was appointed on October
9 12, 2016 (Dkt. 62). A Consolidated Class Action Complaint was filed on November 22,
10 2016 (Dkt. 88, “CAC”); the First Amended Consolidated Class Action Complaint was filed
11 on January 27, 2017 (Dkt. 107, “FAC”); and a negotiated, stipulated Protective Order was
12 entered on January 26, 2017 (Dkt. 105). The parties also conducted a first, unsuccessful
13 mediation during this period (*see infra* Section II(B)). Heller/Cappio Decl. ¶¶ 7-9, 11.

14 **Stage 2, Motions to Dismiss the FAC and Initial Written Discovery (February**
15 **2017 – September 2017):** Between March and May 2017, the parties briefed motions to
16 dismiss by Theranos, Holmes, and Balwani (jointly, Dkt. 122), and Walgreens (separately,
17 Dkt. 123). Shortly thereafter, on June 13, 2017, the Court granted in part and denied in part
18 the motions to dismiss (Dkt. 139). Plaintiffs filed a partial motion for reconsideration (*See*
19 *Dkt. 139 at 22; Dkt. 140*). After oral argument on that motion (Dkt. 148), the Court granted
20 in part the motion for reconsideration on September 29, 2017, permitting Plaintiffs to re-
21 plead their claims for battery and medical battery (Dkt. 157).

22 Meanwhile, the parties served Initial Disclosures in March 2017, and written
23 discovery opened on April 25, 2017 (Dkt. 134). In this period, Plaintiffs also issued public
24 records requests to multiple state Departments of Health, the Food and Drug
25 Administration, the Centers for Medicare & Medicaid Services (CMS), the Federal Trade
26 Commission, and the Department of Justice. Plaintiffs also pursued relevant information by
27 monitoring developments in other litigation and investigations involving Holmes, Balwani,
28 and Theranos (collectively, the “Theranos Defendants”) and/or Walgreens, which included

1 the Arizona Attorney General (“AZAG”) Complaint against Theranos on behalf of Arizona
2 consumers and simultaneous announcement of a Consent Decree, which Theranos would
3 later argue affected “aspects of [Plaintiffs’] claims and damages” (Dkt. 137). Heller/Cappio
4 Decl. ¶¶ 13-14, 17.

5 **Stage 3, Filing of Second Amended Consolidated Class Action Complaint**
6 **(“SAC”) and Second Round of Motions to Dismiss; Litigation Regarding Effects of the**
7 **AZAG Consent Decree (October 2017 – April 2018):** Plaintiffs filed their SAC on
8 October 20, 2017 (Dkt. 159), attaching numerous supporting exhibits they had located
9 through extensive factual research. Additional significant case events during this period
10 included litigating motions to dismiss the SAC by the Theranos Defendants (jointly) and
11 Walgreens, which were briefed between December 2017 and February 2018, and heard on
12 March 19, 2018 (Dkt. 166, 167, 171, 173, 175, 180, 183). In this round of motions,
13 Defendants raised several challenges, including that the AZAG Consent Decree mooted
14 Plaintiffs’ claims. Plaintiff B.P. brought a motion to intervene in the Attorney General’s
15 lawsuit against Theranos in Maricopa Superior Court to protect the interests of Class
16 Members, which was denied on April 19, 2018, with that court leaving it to this Court to
17 decide the impact of the Consent Decree on this case. *See B.P. v. Theranos*, No. 2017-
18 006644 (Ariz. Sup. Ct. Apr. 20, 2018). In this case, the District Court granted in part and
19 denied in part Defendants’ second wave of motions to dismiss. The Court concluded, *inter*
20 *alia*, that Plaintiffs had sufficiently pled battery and medical battery claims on behalf of a
21 putative subclass and that Plaintiffs’ claims were not “currently” mooted by the AZAG
22 Consent Decree (Dkt. 182). Heller/Cappio Decl. ¶¶ 19, 21.

23 **Stage 4, Document Review Commences and Other Discovery Continues (May**
24 **2018 – November 2018):** Discovery opened for all purposes on April 30, 2018 (Dkt. 185),
25 and Defendants answered the SAC on May 10, 2018 (Dkt. 188, 189). The Parties served
26 additional party discovery throughout that Summer and Fall. For their part, Plaintiffs served
27 further party discovery, as well as third-party subpoenas on business entities and individuals
28 likely to have discoverable information. Plaintiffs negotiated separate protocols with the

1 Theranos Defendants and Walgreens regarding production of Electronically Stored
2 Information (Dkt. 192, 193), as well as a HIPAA-compliant Qualified Protective Order with
3 Theranos (and later the Theranos ABC) to permit the production of sensitive patient data
4 (Dkt. 209, 237).

5 Outside developments altered the position of the Theranos Defendants. Holmes and
6 Balwani were federally indicted in June 2018. In September 2018, Theranos filed a Notice
7 of Dissolution, entered into an assignment for the benefit of creditors, and stated that its
8 counsel would either be substituted or withdraw (Dkt. 216).

9 The Defendants made their initial productions of documents in this period. Theranos
10 conducted a limited responsiveness review given its financial situation, and produced
11 1,271,614 documents totaling 7,693,952 pages, including 127,319 “native” files at this stage
12 alone. Plaintiffs began reviewing the massive productions, which review continued through
13 subsequent stages of the case. Heller/Cappio Decl. ¶¶ 24-27.

14 **Stage 5, Class Certification Motion and Continued Discovery (December 2018 –**
15 **May 2019):** Plaintiffs filed their motion for class certification on May 24, 2019 (Dkt. 258).
16 Materials filed in support of this motion included the Expert Declaration of Geoffrey S.
17 Baird, M.D., Ph.D., plaintiff and fact witness deposition testimony, and other voluminous
18 materials obtained through discovery. Fact and expert discovery continued during this stage.
19 In addition to Theranos’s 2018 productions, by May of 2019, Walgreens had produced
20 34,610 documents totaling 142,509 pages. Holmes had produced 1,818 documents totaling
21 6,936 pages, and Balwani had produced 347 documents totaling 3,852 pages. The seven
22 named Plaintiffs responded to written discovery from Defendants. Heller/Cappio Decl. ¶¶
23 30-32.

24 **Stage 6, Continued Class Certification Briefing, Depositions, and Class**
25 **Certification Hearing (June 2019 – February 2020):** During this period, Balwani (with
26 Holmes joining) and Walgreens filed separate oppositions to Plaintiffs’ class certification
27 motion, and Walgreens brought a motion to exclude Plaintiffs’ expert Dr. Baird, all of which
28 was fully briefed (Dkt. 288-300, 316-319). The seven named Plaintiffs were deposed,

1 additional Walgreens fact depositions were taken, Plaintiff’s expert, Dr. Baird, was
2 deposed, and oral argument on Plaintiffs’ class certification motion occurred on January 23,
3 2020 (Dkt. 363). Heller/Cappio Decl. ¶ 36.

4 **Stage 7, Petitions for Interlocutory Review, Class Notice Preparation**
5 **Commences (March 2020 – May 2020):** The Court granted Plaintiffs’ motion for class
6 certification on March 6, 2020 (Dkt. 369), and initial work on Class notice commenced soon
7 thereafter. Walgreens and Balwani each separately filed Rule 23(f) petitions for
8 interlocutory review of the class certification order, which the Ninth Circuit granted against
9 Plaintiffs’ opposition (Dkt. 373, 374, 377, 378). Heller/Cappio Decl. ¶¶ 39-40.

10 **Stage 8, Rule 23(f) Interlocutory Appeal of Class Certification Order (June 2020**
11 **– September 2021):** The Court stayed all proceedings pending resolution of the
12 interlocutory appeals on June 8, 2020 (Dkt. 382). The parties briefed the two appeals filed
13 by Walgreens and Balwani, respectively. Oral argument was held on the appeals, after
14 which the Ninth Circuit on September 8, 2021 affirmed in part and remanded for the Court
15 to limit the subclass and battery claims against Walgreens to “tiny” blood draw patients who
16 had their blood drawn by Walgreens employees (as opposed to Theranos employees) (Dkt.
17 396). Meanwhile, this case was assigned to this Court in the summer of 2020 (Dkt. 391).
18 Heller/Cappio Decl. ¶¶ 43-44.

19 **Stage 9, Class Data Analysis and Issuance of Class Notice (October 2021 – June**
20 **2022):** On remand, the parties filed a Joint Status Report regarding post-appellate
21 proceedings (Dkt. 400), and after a telephonic status conference, the Court ordered briefing
22 on whether the spreadsheets upon which Plaintiffs would rely to identify members of the
23 narrowed Subclass undercut Judge Holland’s class certification order (Dkt. 401, 402, 407).
24 After briefing (Dkt. 409, 416), the Court held a hearing on December 20, 2021 (Dkt. 435);
25 and on December 23, 2021 ordered that the Walgreens Edison Subclass would remain
26 certified and that class notice should issue (Dkt. 436). The Parties advised the Court that the
27 Class Notice List had been finalized on June 14, 2022 (Dkt. 463). Heller/Cappio Decl. ¶ 49.

28

1 **Stage 10, Further Merits Discovery, Expert Reports, and Trial Setting (July 2022**
2 **– December 2022)**: During this timeframe, the parties conducted remaining merits
3 discovery. In addition to serving further written discovery and pursuing additional third-
4 party discovery, Plaintiffs sought the Court’s assistance to obtain Walgreens’ 30(b)(6)
5 deposition, resulting in a hearing on October 13, 2022 (Dkt. 489), and the Court permitting
6 the deposition with certain limitations (Dkt. 491). Plaintiffs’ three expert reports were
7 served on November 15, 2022. Plaintiffs’ database expert, Arthur Olsen of Cassis
8 Technologies, served a supplemental expert report on December 16, 2022, and Walgreens’
9 three rebuttal expert reports were served on December 20, 2022. In addition, the Parties
10 participated in a settlement conference before Magistrate Judge Michael T. Morrissey on
11 November 8, 2022, which did not resolve the litigation (Dkt. 499, 500). Following a status
12 conference on December 1, 2022 (Dkt. 503), the Court set a schedule for dispositive motions
13 and trial. Heller/Cappio Decl. ¶¶ 52-53.

14 **Stage 11, Summary Judgment and Mediation (January 2023 – May 2023)**:
15 Plaintiffs served their rebuttal expert reports on January 17, 2023. The parties’ merits
16 experts were deposed between January 23, 2023 and February 3, 2023. From February 24,
17 2023 to April 14, 2023, the parties fully briefed Walgreens’ motion for summary judgment
18 (Dkt. 521, 538, 555) and four related *Daubert* motions (Dkt. 516, 517, 518, 519, 530, 531,
19 532, 535, 551, 552, 553, 554). Following a hearing (Dkt. 557), the Court denied the motion
20 for summary judgment on Plaintiffs’ remaining claims but granted it with respect to
21 Plaintiffs’ prayer for punitive damages (Dkt. 565). Shortly thereafter, Walgreens sought an
22 order certifying the Court’s summary judgment order for interlocutory appeal (Dkt. 575).
23 Plaintiffs began to prepare for trial, which was scheduled to begin on September 5, 2023
24 (Dkt. 565). Around the same time, on May 18, 2023, the parties engaged in another
25 mediation effort with the Honorable Layn R. Phillips (Ret.), resulting in a mediator’s
26 proposal by Judge Phillips to settle the case between Plaintiffs and Walgreens that both
27 sides accepted (Dkt. 577). Heller/Cappio Decl. ¶¶ 56-57, 59.

28

1 **Stage 12, Settlement (June 2023 – October 2023):** During this timeframe, Plaintiffs
2 and Walgreens worked on documenting their agreement in principle in a formal settlement
3 agreement and worked on the various corresponding settlement exhibits. The parties, with
4 the help of the mediator, also engaged in extensive, complex negotiations to try to resolve
5 the claims against the other Defendants, which ultimately yielded the Balwani and ABC
6 Settlements.

7 Preliminary settlement approval papers for all three Settlements were filed on
8 September 6, 2023 (Dkt. 591), with supplemental briefing filed October 6, 2023 (Dkt. 598).
9 The Court granted preliminary approval of the Settlements on October 10, 2023 (Dkt. 601).
10 Since obtaining preliminary approval, the parties have worked closely with the Court-
11 appointed Settlement Administrator, JND, on notice and other implementation efforts.
12 Heller/Cappio Decl. ¶ 61.

13 **B. Mediation and Settlement Negotiation History**

14 Settlement efforts spanned nearly the entire life of this case, with a first mediation
15 occurring in 2017, a settlement conference with Magistrate Judge Morrissey in 2022, and a
16 mediation in 2023.

17 As noted above, the Parties first attempted mediation with the Hon. Layn Phillips in
18 February 2017, participating in an all-day, in person mediation conducted in New York City.
19 The case did not settle at that time. Litigation continued for over five more years.

20 On November 8, 2022, the Parties participated in a settlement conference with
21 Magistrate Judge Michael T. Morrissey (Dkt. 499). This effort, too, was unsuccessful.

22 On May 18, 2023, the Parties engaged in a mediation with Judge Phillips. Having
23 conducted years of litigation, including substantial document productions, depositions,
24 independent research, motions practice and expert work, the parties were well-positioned to
25 understand the strengths and weaknesses of their positions and the risks of further litigation.
26 Extensive summary judgment motions practice had concluded and trial was set for the fall
27 of 2023. Plaintiffs and Walgreens each prepared mediation submissions for Judge Phillips.
28 After twelve hours of negotiations, Judge Phillips made a mediator’s proposal to settle the

1 case between Plaintiffs and Walgreens, which they accepted.

2 Although Mr. Balwani's counsel and Ms. Holmes attended the mediation with Judge
3 Phillips in May 2023, a settlement with them was not reached at that time. After the
4 mediation, Judge Phillips' office continued to facilitate negotiations with Ms. Holmes and
5 Mr. Balwani's counsel. These efforts were complicated by Ms. Holmes and Mr. Balwani's
6 incarceration, and their assertions that they lacked funds to pay a meaningful settlement
7 amount (if any at all). After working through these issues from May to September 2023,
8 agreements were ultimately reached with Mr. Balwani and the ABC. Despite Class Counsel's
9 efforts to reach global peace, a settlement with Ms. Holmes could not be reached.¹

10 **C. Summary of the Settlements**

11 Under the Walgreens Settlement, Walgreens will pay \$44 million to create a non-
12 reversionary common fund. The settlement funds will be distributed to Class Members
13 pursuant to the proposed Plan of Allocation, after deduction of costs related to settlement
14 administration as well as any Court-approved award of attorneys' fees, service awards to
15 Class Representatives, and reimbursement of litigation expenses. (*See infra* Section II(F) re:
16 the Plan of Allocation). In return, Class Members will release all claims against Walgreens
17 that they could have asserted in this Action.

18 The Balwani Settlement provides that Balwani will release his claims against the
19 Theranos ABC, which the ABC reports have delayed the distribution of its limited remaining
20 assets to Theranos creditors, including the Class. Plaintiffs, Walgreens, and the Theranos
21 ABC have also reached an agreement as to the relative value of Walgreens' and the Class's
22 claims against the ABC, which allows for the early payment on the Class's claim against the
23 ABC, enabling the funds to be deposited into the Settlement Fund being established pursuant
24 to the Walgreens Settlement and distributed along with those funds to Class Members.

25 Class Members will receive a payment consisting of the Class Member Base Payment
26 plus an additional payment based on the unreimbursed costs of their Theranos blood testing

27 ¹ Class Counsel will seek dismissal of the claims against Ms. Holmes without prejudice—
28 so that any Class Member so interested may pursue them—following final approval of the
Walgreens, Balwani, and ABC Settlements, if granted.

1 services. (*See id.* re: the Class Member payment calculation and amount). Members of the
2 Walgreens Edison Subclass will, as compensation for their battery claims, receive an
3 additional payment. (*See id.* re: the Walgreens Edison Subclass payment).

4 **D. The Classes and Class Size**

5 The certified Class and Subclass are as follows:

6 Class: All purchasers of Theranos testing services, including consumers who
7 paid out-of-pocket, through health insurance, or through any other collateral
8 source (collectively, “purchasers”) between November 2013 and June 2016.

9 Walgreens Edison Subclass: All purchasers of Theranos testing services who
10 were subjected to “tiny” blood draws by a Walgreens employee between
11 November 2013 and March 2015.

11 In their Supplemental Memorandum, Plaintiffs submitted detailed information regarding
12 the Class and Subclasses, including the data used to identify Class Members and the size of
13 the Classes (Dkt. 598).

14 In brief, the analysis of Plaintiffs’ expert Arthur Olsen, who considered more than
15 5,000 spreadsheets produced in this litigation, identified the members of the Class and
16 Walgreens Edison Subclass, the Theranos Testing Costs associated with each visit, the type
17 of blood draw, who conducted the blood draw, whether that Class Member received a refund
18 under the 2017 AZAG Consent Decree and, if so, in what amount, and whether such refund
19 check was negotiated. Mr. Olsen’s Class Data List was provided to JND for purposes of
20 effectuating the proposed Notice Plan and Plan of Allocation.

21 JND then refined the output of Mr. Olsen’s analysis using industry standard
22 deduplication processes, to associate the individual testing visit-level data to unique Class
23 Members. In Plaintiffs’ Supplemental Memorandum, JND provided information regarding
24 the Class and Subclass sizes based on the Class Data List as refined: 198,982 Class
25 Members, and 7,866 Walgreens Subclass Members (Dkt. 598-2, ¶¶ 7-8).

26 **E. Class Notice and CAFA Notice**

27 In its Preliminary Approval Order, the Court approved the proposed settlement notice
28 program and appointed JND as the Settlement Administrator. JND has since implemented

1 the Court-approved notice program, described in more detail below. The settlement notice
2 program utilizes the Class Data List prepared by Mr. Olsen, which added additional data
3 fields to the Class List that Mr. Olsen and JND compiled for purposes of sending litigation
4 class notice in 2022. The mailing and email address information used for the 2022 notice
5 program came from Theranos’s testing records and was updated by JND through its standard
6 processes (including updating addresses, where possible, and re-mailing notices that were
7 returned undeliverable) (Dkt. 482-1, ¶¶ 3, 6). As set forth in Plaintiffs’ Supplemental
8 Memorandum, the 2022 notice program was highly successful (Dkt. 598 at 8–9; *see also*
9 Dkt. 482-1, ¶¶ 7, 9-10). Pursuant to the Preliminary Approval Order, the settlement notice
10 program similarly included direct notice through mail and email, digital notice, publication
11 notice, toll-free number, and a settlement website. Each of these settlement notice steps has
12 been, or is being, implemented, as follows.

13 ***Direct Email and Post Card Notices:*** JND began delivering email notices to the
14 39,000 Class Members for whom it possessed email addresses on a rolling basis, beginning
15 October 31, 2023. Prior to beginning email notice, JND took efforts to enhance
16 deliverability, as described in the Keough Declaration, ¶ 5. JND also utilized industry-
17 leading tools to enhance deliverability and monitored the effectiveness of the program during
18 its rollout. *Id.* ¶ 6. Among other things, JND began the rolling program with a low volume,
19 so as to monitor the deliverability of the email notices and allow for adjustment if necessary.
20 *Id.* ¶ 13. The email notice program was completed by the Notice Date of November 9, 2023,
21 with JND making ongoing efforts to reach any Class Member whose email notice was
22 characterized by either a “Soft Bounce” or “Hard Bounce.” *Id.* ¶¶ 10-13.

23 JND completed the first round of postcard notice mailing by the notice date of
24 November 9, 2023. *Id.* ¶ 16. JND is tracking (and will continue to track) the postcard notices
25 that have been returned as undeliverable. *Id.* ¶¶ 15-16. Upon receipt of an undeliverable
26 notification, JND either mails a notice to the forwarding address provided by the USPS or,
27 where a forwarding address is not available, conducts advanced address research. *Id.* JND
28 has promptly remailed (and will continue to re-mail) undelivered notices where an address

1 has been or can be located. *Id.*

2 In working to enhance deliverability of settlement notice, JND determined that some
3 email and postcard addresses were not available in the Class Data List (that is, the Class Data
4 list provided information regarding the Class Members' address, purchases, and other
5 information, but not a name). Notices were addressed to "Resident" in these instances. The
6 Plan of Allocation provides for the direct issuance of settlement checks to Class Members
7 without the need for a claim form or other claim process, but a check obviously cannot be
8 issued payable to "Resident." This issue presented for 18,792 physically addressed postcard
9 recipients (and a small handful of email addresses). To address this issue, three steps were
10 then taken: First, the email and postcard settlement notices were slightly modified for the
11 "Resident" Class Members to advise that they needed to contact JND, as notice
12 administrator, to provide their name so that a settlement check could be mailed to them.
13 Second, to protect against fraud, JND determined that a date of birth for nearly all (all except
14 44) of these Class Members is available in the Class Data List, providing a means to check
15 against wrongful attempts to claim a Class Members' settlement check. Third, JND will
16 process each request to update a Class Member's name using industry standard fraud
17 prevention techniques. *Id.* ¶ 15.

18 ***Digital Notice, Publication Notice, Website, and Toll-Free Phone Number:*** The
19 settlement notice program also included a targeted digital notice program similar to the
20 digital program used for the litigation class notice, and is likewise expected to deliver a total
21 of 8.3 million impressions (Dkt. 591-16, ¶¶ 26–27). The 60-day digital notice program began
22 on November 9, 2023. Keough Decl. ¶¶ 18-19.

23 The settlement notice program also contemplated publication notice in the *Arizona*
24 *Republic*. A print advertisement was secured in the November 22, 2023 *Arizona Republic*.
25 *Id.* ¶ 17.

26 The settlement website (*i.e.*, as updated) went live on October 31, 2023. In addition
27 to providing key case documents, that website contains functionality to allow Class Members
28 to update their contact information, look up their estimated settlement payment amount

1 through a unique Claim ID/PIN # assigned in their Notice, and submit inquiries to JND. As
2 of November 20, 2023, the website has tracked 8,662 unique users with 33,786 page views.
3 *Id.* ¶¶ 20-23.

4 The updated informational toll-free number is operational. As of November 20, 2023,
5 there have been a total of 466 calls received. *Id.* ¶¶ 26-27. The settlement email address,
6 info@TheranosLawsuit.com is also operational and, as of November 20, 2023, has received
7 1,459 emails. *Id.* ¶¶ 24-25.

8 **CAFA Notice:** As contemplated in the Preliminary Approval Order, Walgreens
9 reports that it caused CAFA notice to be sent to the relevant government entities on or around
10 September 14, 2023.

11 **F. Anticipated Class Payments and the Plan of Allocation**

12 As described in the proposed Plan of Allocation (Walgreens Settlement, Ex. C), the
13 default amount of Class Member payments will be calculated as follows: (a) \$10 (the “Base
14 Payment”); plus (b) two times the amount of the Class Member’s Theranos Testing Costs,
15 minus the amount of any negotiated refund checks for that Class Member from the 2017
16 AZAG settlement as reflected in the Class Data List. These amounts (other than the \$10 base
17 payment portion) comprise the “Unadjusted Class Member Payment” that will be subject to
18 a higher or lower *pro rata* adjustment depending on the funds available for distribution (“Net
19 Settlement Fund”). The Walgreens Edison Subclass Member payments are calculated as
20 \$1,000 per Walgreens Edison Subclass Member, subject to adjustment on the same basis as
21 the Unadjusted Class Member Payment. Further information about the data/information
22 being used to calculate these amounts for each Class and Walgreens Edison Subclass
23 Member was provided in the supplemental preliminary approval brief filed by Plaintiffs on
24 October 6, 2023 (Dkt. 598).

25 Thus, the Plan of Allocation requires JND to identify unique Class Members within
26 the Class Data List, which was organized by “accession,” meaning Theranos testing visit,
27 rather than by person. JND aggregated all accessions associated with a unique “Class
28 Member record” (*i.e.*, person) so that each individual would be associated with one record

1 of all of their Theranos testing visits (Dkt. 598-2, ¶ 5).

2 Next, the Plan of Allocation required JND to perform several calculations:

3 First, JND identified the “Theranos Testing Costs” for the 299,345 accessions (visits)
 4 on the Class Data List, pursuant to the following guidance: JND used the four Testing Costs-
 5 related data fields in the Class Data List. Where all values in those fields were the same for
 6 an accession, that value was identified as the Theranos Testing Costs for that accession. In
 7 any instances where the Class Data List contains more than one value in the four Testing
 8 Costs-related fields (*i.e.*, if there was any variation at all), and as detailed in Plaintiffs’
 9 supplemental brief in support of Preliminary Approval (Dkt. 598 at 5-6), Plaintiffs instructed
 10 JND to use the highest of the available values for purposes of calculating the “Theranos
 11 Testing Cost” of a particular accession (*See* Dkt. 598-2, ¶ 10). Plaintiffs believe this is the
 12 most appropriate and equitable method to address the modest variations within the data
 13 regarding Class Member payment information. No Theranos Testing Cost data was available
 14 (the applied values in all four fields were blank) for 34,632 accessions on the Class Data
 15 List. For these accessions, the Plan of Allocation requires JND to assign the average of the
 16 Theranos Testing Costs that were available (Dkt. 591-11, ¶ 1-B; Dkt. 598-2, ¶ 12).

17 Second, JND identified the amounts of any refunds negotiated by Class Members to
 18 deduct that amount from each Class Member’s final payment. With respect to offsets for the
 19 AZAG refunds, the Class Data List identifies, for each accession, whether a refund was sent
 20 and in what amount, and whether that refund was negotiated or not (Dkt. 598-2, ¶¶ 10, 14).
 21 As Mr. Olsen explains, that information was provided by Rust Consulting, the administrator
 22 of the AZAG settlement (Dkt. 598-1, ¶ 6(b)-(c)).

23 JND then totaled the Theranos Testing Costs for each individual Class Member record
 24 based on their accessions. As previously reported (Dkt. 598-2, ¶¶ 11-12, 14), the pertinent
 25 estimated numbers, based on the available data, are as follows:

Total Theranos Testing Costs	\$10,556,737.19
Average Theranos Testing Costs per accession ²	\$39.88

26
 27
 28 ² This is the average cost per Theranos Testing visit. On average, Class Members were associated with more than one (approximately 1.5) visits in the Class Data List.

Total Theranos Testing Costs including average costs for accessions with no payment data	\$11,937,861.35
Two times the total Theranos Testing Costs (“Unadjusted Class Member Payments” as defined in Plan of Allocation)	\$23,875,722.70
Total number of AZAG Refunds issued to Class Member	104,142
Total number of AZAG Refunds negotiated by Class Members	81,001
Total dollar amount of AZAG Refunds Issued to Class Members	\$4,108,060.21
Total dollar amount of Class Members’ negotiated AZAG Refund Checks	\$3,337,199.32

Pursuant to the proposed Plan of Allocation, the Unadjusted Class Member Payment Amount portion of the Class Member Payment and the default Walgreens Edison Subclass Payment amount (\$1,000 per Walgreens Edison Subclass Member) are subject to *pro rata* adjustment depending on the extent to which the Net Settlement Fund (*i.e.*, the amount available for distribution after attorneys’ fees, costs, service awards, and administrative costs) is either insufficient or more than enough to make all payments at the default amounts. JND previously provided the following estimates based on an assumption that the Net Settlement Fund available for distribution would be equal to \$30,422,766.42:

<i>Pro rata</i> adjustment (not applicable to \$10 base payment or AZAG offset)	1.000895447
Total Class Member Payments	\$22,549,722.82 (including the \$10 Base Payment and accounting for the AZAG offset)
Average Class Member Payment	\$113.33 (including the \$10 Base Payment and accounting for the AZAG offset)
Walgreens Edison Subclass Member Payment	\$1,000.89
Total Walgreens Edison Subclass Member Payments	\$7,873,043.59

See Dkt. 598-2, ¶¶ 16-17.

If the Court approves the attorneys’ fees, litigation expenses, and Class Representative service awards sought in Class Counsel’s accompanying fee application, the Net Settlement Fund available for distribution would be materially the same as previously estimated by JND, but calculated as: \$44,000,000 (Walgreens Settlement amount), plus \$1,331,094.88 (Balwani Settlement amount), less the sum of \$13,200,000 (30% of

1 Walgreens Settlement Amount), \$1,160,911.2 (litigation expenses, including the 2022
2 litigation class notice), \$500,000 (JND’s estimated Settlement Administration expenses),
3 and \$70,000 (total requested Class Member service awards), *i.e.*, \$30,400,183.68.

4 **G. Response of the Class to Date**

5 The deadline by which Class Members must object to the Settlements is January 8,
6 2024.

7 **III. LEGAL STANDARD**

8 A court may approve a proposed settlement of a class action “only after a hearing
9 and only on finding that [the proposed settlement] is fair, reasonable and adequate.” Fed. R.
10 Civ. P. 23(e)(2). In determining whether a settlement is fair, reasonable, and adequate, Rule
11 23(e)(2) directs consideration of the following factors:

- 12 (A) the class representatives and class counsel have adequately represented
13 the class;
- 14 (B) the proposal was negotiated at arm’s length;
- 15 (C) the relief provided for the class is adequate, taking into account:
 - 16 (i) the costs, risks, and delay of trial and appeal;
 - 17 (ii) the effectiveness of any proposed method of distributing relief to
18 the class, including the method of processing class-member claims;
 - 19 (iii) the terms of any proposed award of attorney’s fees, including
20 timing of payment; and
 - 21 (iv) any agreement required to be identified under Rule 23(e)(3); and
- 22 (D) the proposal treats class members equitably relative to each other.

23 *See also Briseño v. Henderson*, 998 F.3d 1014, 1026 (9th Cir. 2021) (describing the Ninth
24 Circuit’s eight-factor test as “fall[ing] within the ambit of” the current version of Rule 23(e)).

25 Two of these factors—adequate representation and arm’s length negotiation—are
26 “procedural.” Fed. R. Civ. P. 23(e)(2) Advisory Comm. Note to 2018 Amendment. The
27 remaining factors are “substantive” and “look at the adequacy of the class’s relief and the
28 equity of its distribution across the class.” 4 *Newberg on Class Actions* § 13:13 (6th ed.
2022).

1 **IV. THE SETTLEMENTS MERIT FINAL APPROVAL**

2 The Settlements warrant final approval under Rule 23(e). We discuss each of the
3 Rule 23(e) factors in turn.

4 **A. Rule 23(e)(2)(A): The Class Representatives and Class Counsel Have**
5 **Adequately Represented the Class.**

6 As the Court found at preliminary approval, “Plaintiffs and Class Counsel have
7 adequately represented, and will continue to adequately represent, the Class and Subclasses.”
8 (Dkt. 601 at 4). The Advisory Committee’s notes state that this factor looks to the conduct
9 of the litigation, focusing on the actual performance of class counsel. Factors may include
10 the nature and amount of discovery conducted, the outcome of other cases, and the adequacy
11 of counsel’s information. 4 *Newberg on Class Actions* § 13:49 (6th ed. 2022). The Ninth
12 Circuit has similarly advised that in analyzing the fairness of a proposed class settlement
13 “the extent of discovery completed and the stage of the proceedings” should be considered.
14 *Kim*, 8 F.4th at 1178; *Churchill Vill.*, 361 F.3d at 575.

15 Class Counsel have adequately represented the certified Class and Subclasses as
16 required by Rule 23(e)(2)(A). The Parties reached the Settlements after the close of
17 discovery. Over the course of nearly seven years, the litigation saw the production of over
18 7.8 million pages of documents, 26 fact witness depositions, and six expert depositions.
19 There was extensive third-party discovery. There were numerous other cases and
20 investigations related to Theranos, which Class Counsel closely tracked to obtain pertinent
21 information and documents. That includes, but is not limited to, the AZAG Consent Decree,
22 reached with Theranos, pursuant to which Theranos agreed to pay \$4.65 million in consumer
23 restitution, substantially less than what the Settlements here provide.

24 Class Counsel have significant experience successfully prosecuting complex class
25 actions. They had more than adequate information and knowledge of the field to assess
26 litigation of this kind, including that obtained from two rounds of Rule 12 motions, class
27 certification briefing, an interlocutory appeal, further class certification-related motions
28 practice on remand, summary judgment practice, and trial preparation. As noted at

1 preliminary approval, the Class Representatives are Class Members and B.P. is a Walgreens
2 Edison Subclass Member, such that the Class and Subclass are represented adequately.

3 **B. Rule 23(e)(2)(B): The Proposed Settlements Were Negotiated at Arm’s Length.**

4 The Settlements were negotiated at arm’s length, satisfying Rule 23(e)(2)(B). The
5 Advisory Committee notes state that the involvement of a neutral mediator may bear on
6 whether settlement negotiations were conducted “in a manner that would protect and further
7 the class interests.” At its root, this factor aims to guard against collusive settlements. *See*
8 *Newberg on Class Actions* § 13:50 (6th ed. 2022). The Ninth Circuit has similarly directed
9 district courts to pay close attention to signs of collusion, such as the presence of a clear
10 sailing arrangement, a disproportionate distribution of the settlement to counsel, and/or the
11 presence of a reverter clause. *Briseño*, 998 F.3d at 1023; *In re Bluetooth Headset Prods.*
12 *Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). These Settlements are not collusive. They do
13 not have a clear sailing provision, disproportionate payment of the settlement amount to
14 counsel, or a reverter clause.

15 On the contrary, these Settlements came to fruition only after years of contentious
16 litigation and three good-faith mediations/settlement conferences. In connection with those
17 efforts, the parties prepared substantial briefing before each of the three mediations and
18 marshaled evidence for the parties’ and the mediators’ consideration. That the Walgreens
19 Settlement was successfully reached after a third mediation under the guidance of Ret. U.S.
20 District Judge Layn Phillips as mediator further demonstrates that the Settlements were
21 negotiated at arm’s length. *See, e.g., In re MGM Mirage Sec. Litig.*, 708 F. App’x 894, 897
22 (9th Cir. 2017) (finding a settlement was not collusive where “the parties reached a
23 settlement after extensive negotiations before a nationally recognized mediator, retired U.S.
24 District Judge Layn R. Phillips”); *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Pracs.,*
25 *and Prods. Liab. Litig.*, No. 17-md-02777, 2019 WL 536661, at *8 (N.D. Cal. Feb. 11, 2019)
26 (finding “procedural indicators confirm adequacy” where “[t]he settlement was vigorously
27 negotiated at arm’s length and with the assistance of one of the country’s preeminent
28 settlement masters”).

1 With respect to the other two settlements, Judge Phillips' office continued to assist
2 the parties over multiple months. Judge Phillips' office remained highly engaged assisting
3 Plaintiffs seeking resolution, and these efforts culminated in the Balwani Settlement and
4 ABC Agreement.

5 **C. Rule 23(e)(2)(C): The Relief Provided for the Class is Absolutely Adequate.**

6 The next Rule 23(e) factor directs a district court to consider whether "the relief
7 provided for the class is adequate." Fed. R. Civ. P. 23(e)(2)(C). In determining the adequacy
8 of the relief, the rule instructs consideration of:

- 9 (i) the costs, risks, and delay of trial and appeal;
10 (ii) the effectiveness of any proposed method of distributing relief to the class,
11 including the method of processing class-member claims;
12 (iii) the terms of any proposed award of attorney's fees, including timing of
13 payment; and
14 (iv) any agreement required to be identified under 23(e)(3).

14 These factors look to the substantive fairness of the proposed settlement, a main concern
15 being the expected relief the settlement will provide to the class. *See* Fed. R. Civ. P.
16 23(e)(2)(C)(i)-(iv), Advisory Committee's Note to 2018 Amendment. The Ninth Circuit also
17 instructs consideration of, *inter alia*, the strength of plaintiffs' case; the risk, expense, and
18 duration of further litigation, including the risk of maintaining class action status through
19 trial; and the amount offered in settlement. *Kim*, 8 F.4th at 1178; *Churchill*, 361 F.3d at 575.

20 The relief provided to the Class and Subclasses is not only adequate, it is impressive.
21 While many fair class settlements provide for only a fraction of potential recovery, *see*
22 *Officers for Just. v. Civ. Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 628
23 (9th Cir. 1982), these Settlements provide relief (estimated to be over \$113 per Class
24 Member, on average, and \$1,000 to Subclass Members) which, as the Court noted, is
25 "substantially more than the actual costs of their Theranos blood testing services" (Dkt 601
26 at 4).

27 Moreover, the settlement payment amounts here compare favorably to what the Class
28 Members could have hoped to receive at trial. Plaintiffs' claims provided for the following

1 types and categories of damages: three times the amount of damages incurred by reason of
2 statutory violation (Civil RICO, *see* 18 U.S.C. § 1962(c); 18 U.S.C. § 1964); “actual”
3 damages, including consideration paid and out-of-pocket expenses and punitive damages
4 (ACFA, *see Holeman v. Neils*, 803 F. Supp. 237, 242 (D. Ariz. 1992); *Parks v. Macro-*
5 *Dynamics, Inc.*, 591 P.2d 1005, 1009 (Ariz. Ct. App. 1979)); “restitution,” meaning “the
6 return of money or other property obtained through an improper means to the person from
7 whom the property was taken,” including wrongfully-earned profits in which a plaintiff has
8 an “ownership interest” (UCL and FAL, *see Hambrick v. Healthcare Partners Med. Grp.,*
9 *Inc.*, 189 Cal. Rptr. 3d 31, 55 (Ct. App. 2015)); and compensatory (including consequential
10 and emotional distress) damages, punitive damages, and “presumed” damages in an amount
11 determined by the jury for the Subclass’s battery and medical battery claims (*Johnson v.*
12 *Pankratz*, 2 P.3d 1266, 1269 (Ariz. Ct. App. 2000)). The state statutes also provide for
13 injunctive relief in appropriate cases.

14 The relief available at trial, however, was substantially narrower, for three primary
15 reasons.

- 16 • *First*, the District Court struck Plaintiffs’ claims for injunctive relief
17 on June 13, 2017, finding that “Theranos no longer conducts blood
18 tests” and “has no intention of resuming its consumer laboratory testing
19 operations” (Dkt. 139 at 57).
- 20 • *Second*, the District Court limited the recoverable damages at class
21 certification, holding the Class was “precluded from seeking damages
22 for emotional distress, retesting and/or subsequent medical care” under
23 the RICO, the ACFA, UCL and FAL; and that the Walgreens Edison
24 Subclass was “precluded from seeking damages for emotional distress,
25 retesting and/or subsequent medical care” under the battery claims
26 (Dkt. 369 at 24–25).
- 27 • *Third*, the District Court granted summary judgment on Plaintiffs’
28 punitive damages claim on May 4, 2023, finding that Plaintiffs’
evidence did not show conduct on the part of Walgreens sufficient to
warrant punitive damages (Dkt. 565 at 25).

As such, potentially recoverable damages at trial were confined to Class Members’
out-of-pocket expenses (the “Theranos Testing Costs”), subject to trebling under Civil
RICO; a potential award of restitution based on Defendants’ profits from Theranos testing

1 in which the Class had an “ownership interest” (if any); and the value that a jury might
2 attribute to the dignitary harm associated with the Walgreens Edison Subclass Members’
3 battery claims. These amounts would have been subject to an offset in the amounts of
4 negotiated refunds from the AZAG Consent Decree.

5 With respect to the Class Member Payment, even under the proverbial “home run”
6 scenario—where Plaintiffs win at trial and hold onto that result after the inevitable appeal—
7 the maximum expected recovery for the non-battery claims would have been three times the
8 Class Members’ testing costs (under the RICO claim), less an offset for any AZAG Consent
9 Decree payment checks they negotiated. The estimated Class Member payments here
10 compare favorably to that. With respect to the battery claims against Walgreens, as discussed
11 in Plaintiffs’ motion for preliminary approval, it is difficult to predict how a jury would have
12 valued the damages for that claim (assuming Plaintiffs prevailed on liability), but under the
13 circumstances (*e.g.*, “tiny” needle used for a fingerprick), Plaintiffs respectfully submit that
14 the approximately \$1,000 Walgreens Edison Subclass Payment that these consumers will
15 receive is a more than reasonable and adequate result.

16 These Settlements are also outstanding considering other actions against Theranos.
17 The Walgreens Settlement standing alone provides substantially greater relief for the Class
18 than the AZAG’s consent agreement.

19 **1. The costs, risks, and delay of trial and appeal.**

20 A central concern in evaluating the adequacy of the relief provided relates to the cost
21 and risk involved in litigation. Fed. R. Civ. P. 23(e)(2) Advisory Comm. Note to 2018
22 Amendment. In evaluating this factor, “courts may need to forecast the likely range of
23 possible classwide recoveries and the likelihood of success in obtaining such results.” *Id.*
24 The Ninth Circuit also directs courts to consider “the risk, expense, complexity, and likely
25 duration of further litigation.” *Staton*, 327 F.3d at 959.

26 Here, while Plaintiffs have overcome numerous hurdles, and while they believe they
27 could prevail at trial, the costs, risk, and delay of trial and (if successful at trial) inevitable
28 appeal, remain very substantial. Further litigation against Walgreens is high risk. Although

1 Plaintiffs believe the evidence supports a finding of at least willful ignorance, Class Counsel
2 recognize the uncertainties of fact and law present in the case, the uncertainty inherent in a
3 jury trial, and the “potent arguments” with which Walgreens’ tenacious counsel “may well
4 persuade a jury to rule in favor of Walgreens at trial.” (Dkt. 565 at 23). Even putting aside
5 the issue of liability at trial or on appeal, the pursuit of further litigation presents a risk of
6 lesser recovery than the Settlements will provide. There is no way to know what an Arizona
7 jury would award for the bodily invasion of a fingerprick. As set forth in the Declaration of
8 Mark Samson, submitted with Plaintiffs’ Preliminary Approval papers, the \$1,000 estimated
9 award for the Edison Subclasses’ Claims presents an excellent recovery (Dkt. 591-17).
10 Furthermore, Walgreens’ petition for interlocutory appeal of this Court’s summary judgment
11 order created another risk, possibly even before trial. Despite Class Counsel’s confidence in
12 the summary judgment order, they are acutely aware of the risk of delay that an appeal poses.

13 Further litigation against Mr. Balwani would risk no recovery for the Class at all.
14 Given his incarceration and financial circumstances, the Balwani Settlement may be the only
15 realistic way the Class will recover any actual monetary benefit from Mr. Balwani. The
16 Balwani Settlement enabled the ABC Agreement, making funds available for distribution to
17 the Class along with the Walgreens Settlement funds, providing not only monetary benefit
18 but also increasing efficiency and decreasing costs for the class.

19 Class Counsel possess an extensive background in consumer litigation, a deep
20 understanding of the strengths and weaknesses of this case, and in Mark Samson, an attorney
21 with expert knowledge of Arizona juries. In Class Counsel’s informed opinion, further
22 litigation would be contrary to the Class’s interests, given the excellent benefits provided by
23 the Settlements, and the risk that trial might result in a lesser recovery or a judgment that is
24 simply uncollectable. *See Kim*, 8 F.4th at 1178 (noting that the views “the experience and
25 views of counsel” is a factor in weighing approval of a class settlement).

26 **2. The effectiveness of any proposed method of distributing relief to the**
27 **Class, including the method of processing Class-member claims.**

28 The notice plan and Plan of Allocation have been and are effective. The aim of any

1 distribution method “is to get as much of the available damages remedy to class members as
2 possible and in as simple and expedient a manner as possible.” 4 *Newberg on Class Actions*
3 § 13:53 (6th ed. 2022). The distribution method here does just that. There is no claims
4 process—Class Members will receive direct payments by check. Plaintiffs’ expert created a
5 Class Data List containing the Theranos Testing Costs according to funds received under the
6 2017 AZAG Consent Decree as well as Theranos’s own records. This data ensures reduced
7 risk of illegitimate claims while obviating the need for claim forms or documentation which
8 may become unduly burdensome or demanding. The addition of funds from the ABC
9 Agreement streamlines the payment and is the most simple and expedient manner for
10 distribution possible.

11 **3. The terms of any proposed award of attorneys’ fees, including timing of**
12 **payment.**

13 The Walgreens Settlement provides for a non-reversionary common settlement fund
14 of \$44,000,000. As set forth in their application for attorneys’ fees, filed concurrently
15 herewith, Class Counsel seek the Court’s approval of a fee measured as 30% of the
16 Walgreens Settlement amount (and 29.1% of the total settlement funds) and ask the Court to
17 approve reimbursement of their litigation expenses. Under the terms of the Walgreens
18 Settlement, any fees and expenses awarded by the Court will be paid to Class Counsel ten
19 (10) calendar days after the date of Judgment or the order awarding Attorneys’ Fees and
20 Expenses (whichever comes last) (Dkt. 591-2, ¶ 68).

21 The details of Class Counsel’s request and the legal authority for the request are set
22 forth in their fee application. As detailed therein, the fee requested here is consistent with
23 applicable standards and well justified by the circumstances in this case, including Class
24 Counsel’s lodestar in this case, which is substantially higher than the fee amount that will be
25 requested. As of the date of this motion, Class Counsel’s lodestar is already nearly double
26 the amount of the fee requested, with substantial additional work remaining seeking
27 settlement approval and, if that is granted, implementation efforts. Moreover, while the
28 requested fee, as a percentage of the relief obtained, is somewhat higher than the

1 “benchmark,” the amount is very well justified by the unique and compelling circumstances
2 of this case and Class Counsel’s work and assumed risks. Further, there is no hallmark of
3 collusion here. As noted above, the signs of collusion include a clear sailing arrangement, a
4 disproportionate distribution of the settlement to counsel, and/or the presence of a reverter
5 clause. *Briseño*, 998 F.3d at 1023; *Bluetooth*, 654 F.3d at 941. None of those are present
6 here. In short, there is nothing about Class Counsel’s fee request that indicates the
7 Settlements are substantively or procedurally infirm.

8 **4. Any agreement required to be identified under Rule 23(e)(3).**

9 Rule 23(e)(3) requires the parties seeking approval identify any agreement made in
10 connection with the proposed settlement. Class Counsel have identified all agreements made
11 in connection with the Settlements, which includes the Balwani and ABC Agreements, which
12 are separate and independent of the Walgreens Settlement.

13 **D. Rule 23(e)(2)(D): The Proposed Settlements Treat Class Members Equitably**
14 **Relative to Each Other.**

15 The Plan of Allocation’s proposed method of dividing the Settlement proceeds is fair
16 and reasonable. “Approval of a plan of allocation of settlement proceeds in a class action ...
17 is governed by the same standards of review applicable to approval of the settlement as a
18 whole: the plan must be fair, reasonable and adequate.” *In re Oracle Sec. Litig.*, No. 90-0931,
19 1994 WL 502054, at *1–2 (N.D. Cal. June 18, 1994) (citing *Class Pls. v. City of Seattle*, 955
20 F.2d 1268, 1284–85 (9th Cir. 1992)); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d
21 454, 460 (9th Cir. 2000) (district court’s approval of plan of allocation in a class action is
22 subject to abuse of discretion review).

23 The Settlements here treat the Class Members equitably. All Class Members will
24 receive a Class Member Payment consisting of the Class Member Base Payment of \$10 plus
25 an amount based on the unreimbursed cost of that Class Member’s blood testing services.
26 Walgreens Edison Subclass Members will also receive an additional payment to compensate
27 for their battery claims. It is reasonable to allocate settlement funds to Class Members based
28 on the extent of their injuries, their potential recoveries, or the strength of their claims. *In re*

1 *Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1045 (N.D. Cal. 2008).

2 The fact that Plaintiffs are seeking service awards does not change the conclusion.
3 Class representatives often receive such payments for their efforts and commitment on behalf
4 of the class. Such payments do not create unwarranted inequity among Class Members
5 “because the class representative and class member are not similarly situated in regard to the
6 single piece of differential recovery, the incentive payment: the class representative did extra
7 work and took extra risk to earn that.” *See 4 Newberg on Class Actions* § 13:56 (6th ed.
8 2022). The Class Representatives in this case have spent time and effort to this action for
9 nearly seven years. Some compensation for the work and risk involved with that is
10 reasonable.

11 **V. CONCLUSION**

12 For the foregoing reasons, Plaintiffs respectfully request that the Court grant final
13 approval of the Settlements. A [Proposed] Final Order and Judgment were submitted with
14 Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement (Dkt. 591-12).

15
16 DATED this 22nd day of November, 2023.

17 KELLER ROHRBACK L.L.P.

18
19 By *s/ Alison E. Chase*

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2023, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

s/ Alison E. Chase _____

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

In re:
ARIZONA THERANOS, INC.
LITIGATION

No. 2:16-cv-2138-DGC

(Consolidated with)
No. 2:16-cv-2373- HRH
No. 2:16-cv-2660- HRH
No. 2:16-cv-2775- DGC
No. 2:16-cv-3599- DGC

**[PROPOSED] FINAL ORDER AND
JUDGMENT**

1 This matter came before the Court for hearing on _____, 2023, pursuant to the
2 Court’s Preliminary Approval Order dated October 10, 2023 (ECF No. 601) (“Preliminary
3 Approval Order”), and on (i) Plaintiffs’ motion (“Motion”) for final approval of (a) the
4 September 6, 2023 Stipulation of Class Action Settlement entered into by Plaintiffs and
5 Defendants Walgreens Boots Alliance, Inc. and Walgreen Arizona Drug Co. (together,
6 “Walgreens”) (the “Walgreens Settlement Agreement”); (b) the September 6, 2023
7 Stipulation of Class Action Settlement entered into by Plaintiffs and Defendant Ramesh
8 “Sunny” Balwani (the “Balwani Settlement Agreement”); and (c) the September 6, 2023
9 Stipulation of Class Action Settlement entered into by Plaintiffs, Walgreens, and Theranos
10 (assignment for the benefit of creditors), LLC (“Theranos ABC”) (the “Theranos ABC
11 Agreement”) as to the terms related to the Class claims only (collectively, the “Settlement
12 Agreements”); and (ii) Class Counsel’s Motion for an Award of Attorneys’ Fees and
13 Expenses and Service Awards (“Attorneys’ Fee and Expense Application”). Due and
14 adequate notice having been given to the Class Members of the proposed Settlement
15 Agreements and the pending motions, as directed by the Court’s Preliminary Approval
16 Order, and upon consideration of all papers filed and proceedings had herein, and good
17 cause appearing, the Court hereby ORDERS as follows:

18 1. Capitalized terms not otherwise defined herein have the meanings set forth in
19 the Walgreens Settlement Agreement.

20 2. The Court finds that the notice provisions set forth under the Class Action
21 Fairness Act, 28 U.S.C. § 1715, were complied with in this matter.

22 3. The Court reaffirms the appointment of Lieff Cabraser Heimann & Bernstein
23 LLP and Keller Rohrback L.L.P. as Class Counsel.

24 4. The Court reaffirms the appointment of Plaintiffs A.J., A.R., B.P., B.B., D.L.,
25 R.G., and S.L. as class representatives for the Class; Plaintiffs A.J. B.P., B.B., D.L., R.G.,
26 and S.L. as class representatives for the Arizona Subclass; Plaintiff A.R. as class
27 representative for the California Subclass; and Plaintiff B.P. as class representative for the
28 Walgreens Edison Subclass.

1 5. The Court finds that the Notice Plan for disseminating notice to the Class
2 provided for in the Walgreens Settlement Agreement and previously approved and directed
3 by the Court in its Preliminary Approval Order has been implemented by the Settlement
4 Administrator and the Settling Parties. The Court finds that such Notice Plan, including the
5 approved forms of notice: (a) included direct individual notice to all Class Members who
6 could be identified through reasonable effort, as well as supplemental notice via a social
7 media and internet notice campaign and newspaper publication notice; and (b) constituted
8 notice that was reasonably calculated, under the circumstances, to apprise Class Members
9 of the nature of this Action, the definition of the Class and Subclasses, the class claims and
10 issues, the right of Class Members to object to or comment on the Settlement Agreements
11 or the Attorneys' Fees and Expenses Application, and the binding effect of a class judgment;
12 (c) constituted due, adequate, and sufficient notice to all persons entitled to notice; and
13 (d) met all applicable requirements of Federal Rule of Civil Procedure 23, due process under
14 the U.S. Constitution, and any other applicable law.

15 6. The Court hereby finds that all Class Members were adequately provided with
16 an opportunity to exclude themselves from the Class by submitting a request for exclusion
17 in conformance with the terms of the litigation class notice approved by the Court and
18 previously implemented. ECF Nos. 447, 482. All persons who submitted timely and valid
19 requests for exclusion are not in the Class or Subclasses and are not bound by this Final
20 Order and Judgment. A list of those persons who submitted timely and valid requests for
21 exclusion was lodged with the Court. *See* ECF No. 482-1 at Ex. E, 483. Also excluded from
22 the Class and Subclasses are (i) Walgreens and its officers, directors, management,
23 employees, subsidiaries, and affiliates; and (ii) the judges in this case and members of their
24 immediate families. Other than those excluded persons specified in this Paragraph 6, all
25 persons who fall within the definitions of the Class and Subclasses are Class Members and
26 members of the Subclasses, respectively, and shall be bound by this Final Order and
27 Judgment and the Settlement Agreement.
28

1 7. The Court finds that the Settlement Agreements warrant final approval
2 pursuant to Fed. R. Civ. P. 23(e)(2) because the Court finds that the Settlement Agreements
3 are fair, reasonable, and adequate and in the best interest of the Class Members, after
4 weighing the relevant considerations.

5 a. First, the Court finds that Plaintiffs and Class Counsel have adequately
6 represented the Class and Subclasses and will continue to do so through settlement
7 implementation.

8 b. Second, the Settlement Agreements were reached as a result of arms'
9 length negotiations. The Walgreens Settlement Agreement was supervised by, and reached
10 pursuant to a mediator's proposal proposed by an experienced mediator, the Hon. Layn R.
11 Phillips (Ret.), and both the Balwani Settlement Agreement and the Theranos ABC
12 Agreement were reached with the further assistance of Judge Phillips's staff. Further, the
13 Settlement Agreements were reached after significant litigation, investigation, and
14 discovery.

15 c. Third, the Court finds that the relief proposed to be provided is fair,
16 reasonable, and adequate, taking into account, *inter alia*: (i) the costs, risks, and delay of
17 trial and appeal for all Settling Parties; (ii) the legal issues presented in this Action; (iii) the
18 interests of Class Members; (iv) the effectiveness of the proposed method of distributing
19 relief (via mailed checks, without the need for Class Members to file claims); (v) the fact
20 that Balwani claims to lack meaningful resources to satisfy a judgment in this case, and
21 there are limited Theranos assets for distribution to Theranos's creditors; (vi) the fact that
22 the release by Balwani will facilitate the payment of additional funds by the Theranos ABC
23 (in addition to the relief provided by the Walgreens Settlement Agreement) to the Class;
24 and (vii) the terms of the requested award of Attorneys' Fees and Expenses, and Service
25 Awards.

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1 d. Fourth, the Court finds that the Settlement Agreements, including the
2 proposed Plan of Allocation, treat Class Members equitably relative to each other, and that
3 the proposed allocation of settlement funds is reasonable and equitable.

4 8. In granting final approval of the Settlement Agreements, the Court has also
5 considered the factors that courts in this Circuit consider in evaluating proposed class
6 settlements, which overlap considerably with the factors to be considered under Fed. R.
7 Civ. P. 23(e)(2), and finds that they favor final approval. *See Churchill Village LLC v. Gen.*
8 *Elec. Corp.*, 361 F.3d 566, 575 (9th Cir. 2004).

9 9. [Address any objections]. All timely objections submitted by Class Members
10 have been fully considered by the Court and are overruled.

11 10. The Motion is hereby GRANTED, and the Settlement Agreements and their
12 terms are hereby APPROVED as fair, reasonable, and adequate and in the best interest of
13 the Class Members. The Settling Parties and Settlement Administrator are directed to
14 consummate and implement the Settlement Agreements in accordance with their terms
15 (including the Theranos ABC Agreement as related in any way to the Class claims only),
16 including distributing settlement payments to Class Members and other disbursements from
17 the Settlement Fund as provided by the Settlement Agreements.

18 11. Walgreens, Balwani, and Theranos are hereby dismissed from this Action
19 with prejudice and without costs to any party, other than as specified in the Settlement
20 Agreements, this Final Order and Judgment, and any order(s) by this Court regarding Class
21 Counsel's Attorneys' Fees and Expenses Application.

22 12. In consideration of the benefits provided under the Walgreens Settlement
23 Agreement, and for other good and valuable consideration set forth in the Walgreens
24 Settlement Agreement, (a) each Plaintiff and each Class Member shall, by operation of this
25 Final Order and Judgment, have fully, finally, and forever released, relinquished, acquitted,
26 and discharged all Plaintiffs' Released Claims against all Walgreens Released Parties,
27 including Walgreens' counsel; and (b) Walgreens shall, by operation of this Final Order
28 and Judgment, have fully, finally, and forever released, relinquished, and discharged all

1 Walgreens' Released Claims against Plaintiffs' Related Parties, including Class Counsel,
2 in accordance with Section IX of the Walgreens Settlement Agreement, the terms of which
3 section are incorporated herein by reference. The terms of the Walgreens Settlement
4 Agreement, which are incorporated by reference into this Order, shall have *res judicata* and
5 other preclusive effects as to the Released Claims as against the Released Persons. The
6 Released Persons may file the Walgreens Settlement Agreement and/or this Order in any
7 other litigation to support a defense or counterclaim based on principles of *res judicata*,
8 collateral estoppel, release, good-faith settlement, judgment bar or reduction, or any similar
9 defense or counterclaim.

10 13. All Plaintiffs and Class Members and anyone claiming through or on behalf
11 of any of them will be forever barred and enjoined from commencing, instituting,
12 prosecuting, or continuing to prosecute any action or other proceeding in any court of law
13 or equity, arbitration tribunal, or administrative forum, asserting Plaintiffs' Released Claims
14 against any Walgreens Released Parties. This permanent bar and injunction are necessary
15 to protect and effectuate the Walgreens Settlement Agreement and this Order, and this
16 Court's authority to effectuate the Settlement, and is ordered in aid of this Court's
17 jurisdiction and to protect its judgments. Notwithstanding the foregoing, nothing in this
18 Order and Judgment shall preclude an action to enforce the terms of the Walgreens
19 Settlement Agreement.

20 14. In consideration of the benefits provided under the Balwani Settlement
21 Agreement, (a) each Plaintiff and each Class Member shall, by operation of this Final Order
22 and Judgment, be subject to the release set forth in Paragraph 3 of the Balwani Settlement
23 Agreement; and (b) Mr. Balwani shall, by operation of this Final Order and Judgment, be
24 subject to the release set forth in Paragraph 4 of the Balwani Settlement Agreement.

25 15. In consideration of the benefits provided under the Theranos ABC
26 Agreement, and for other good and valuable consideration set forth in the Theranos ABC
27 Agreement, each Plaintiff and each Class Member and the Theranos ABC shall, by
28 operation of this Final Order and Judgment, have fully, finally, and forever released,

1 relinquished, acquitted, and discharged their claims as set forth in Paragraphs 4 (Class
2 Plaintiffs) and 5 (Assignee) thereof, and shall be bound by the Covenant Not to Sue set forth
3 with respect to these Released Claims in Paragraph 6 thereof. This Final Order and
4 Judgment is the final, appealable judgment in the Action as to these Released Claims.

5 16. Without affecting the finality of this Final Order and Judgment in any way,
6 this Court retains jurisdiction over (a) implementation of the Settlement Agreements and
7 the terms of the Settlement Agreements (except the Theranos ABC Agreement, over which
8 this Court retains jurisdiction only as to terms related in any way to the Class claims); (b)
9 Class Counsel's Attorneys' Fees and Expenses Application; (c) distribution of the
10 settlement payments related to Class claims, Class Counsel's Attorneys' Fees and
11 Expenses, and any Service Awards; (d) any request for payment of the Settlement
12 Administrator's expenses in the event of an expenses overage as set forth in the Preliminary
13 Approval Order; and (e) all other proceedings related to the implementation, interpretation,
14 validity, administration, consummation, and enforcement of the terms of the Settlement
15 Agreements. The time to appeal from this Final Order and Judgment shall commence upon
16 its entry.

17 17. If the Walgreens Settlement Agreement Effective Date does not occur, this
18 Final Order and Judgment shall be rendered null and void and shall be vacated, *nunc pro*
19 *tunc*, as set forth in the Court's Preliminary Approval Order, except insofar as expressly
20 provided to the contrary in the Walgreens Settlement Agreement, and without prejudice to
21 the *status quo ante* rights of Plaintiffs, Class Members, and Walgreens.

22 18. This Final Order and Judgment, the Preliminary Approval Order, the
23 Walgreens Settlement Agreement, and all negotiations, statements, agreements, and
24 proceedings relating to the Walgreens Settlement Agreement, or any matters arising in
25 connection with settlement negotiations, proceedings, or agreements shall not constitute, be
26 described as, construed as, offered, or received against Walgreens or the other Released
27 Persons as evidence or an admission: (a) of the truth of any fact alleged by Plaintiffs in the
28 Action; (b) that any person suffered compensable harm or is entitled to any relief with

1 respect to the matters asserted in this Action; (c) of any liability, negligence, fault, or
2 wrongdoing by Walgreens or the Walgreens Released Parties, including any of their
3 affiliates, agents, representatives, vendors, or any other person or entity acting on its behalf;
4 or (d) the enforceability of any applicable contractual or statutory limitations period to limit
5 any relief.

6 19. [To the extent this Order does not address Class Counsel's motion for
7 attorneys' fees, costs and service awards, such motion will be addressed in a separate order.]

8 IT IS SO ORDERED.

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10 Date: _____

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12 _____
13 Hon. David G. Campbell
14 Senior United States District Judge
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