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Class Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEBBIE KROMMENHOCK and STEPHEN HADLEY, on behalf of themselves, all others similarly situated, and the general public,

Plaintiffs,

v.

POST FOODS, LLC,

Defendant.

Case No. 3:16-cv-04958-WHO

PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Judge:	Hon. William H. Orrick
Hearing Date:	Feb. 24, 2021, 2:00 p.m.
Location:	Courtroom 2

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NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, pursuant to Fed. R. Civ. P. 23(e) and the Northern District of California's Procedural Guidelines for Class Action Settlements ("Settlement Guidelines"), on February 24, 2021, at 2:00 p.m., or as soon thereafter as may be heard, Plaintiffs will move the Court, the Honorable William H. Orrick presiding, for an Order preliminarily approving a proposed nationwide class action settlement (the "Settlement"). The Motion is based on this Notice of Motion, the below Memorandum, the concurrently-filed declarations of Jack Fitzgerald ("Fitzgerald Decl."), Colin B. Weir ("Weir Decl."), and Brandon Schwartz ("Schwartz Decl."), and all exhibits thereto, including the parties' January 15, 2021 Settlement Agreement;[1] all prior pleadings and proceedings; and any additional evidence and argument submitted in support of the Motion.

Plaintiffs seek an Order certifying the Settlement Class, granting preliminary approval to the proposed Settlement, approving the proposed Notice Plan and directing Class Notice to be made, and setting schedules and procedures for Class Notice, claims, opting out, objecting, and conducting a Final Approval Hearing.

ISSUES TO BE DECIDED

Whether to certify the Settlement Class, grant the proposed Settlement preliminary approval, and set a schedule and procedures for Class Notice, claims, opting out, objecting, and a Final Approval Hearing.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

After more than four years of hotly-contested litigation and less than five months away from trial, Plaintiffs have obtained a $15,000,000 non-reversionary common fund to compensate members of a nationwide Settlement Class, along with substantial, valuable injunctive relief. The Settlement covers Post products challenged in Plaintiffs' original Complaint including Raisin Bran, Bran Flakes, Great Grains (and its predecessor, Selects), Honey Bunches of Oats Cereal and Granola, Shredded Wheat Honey Nut and Crunch!, Alpha-Bits, Golden Crisp, Honeycomb, and Waffle Crisp (the "Class Products"). Its injunctive relief applies to any Class Product if more than 10% of the cereal's calories come from added sugar, and

[1] Attached to the Fitzgerald Declaration as Exhibit 1, and cited as "SA." Capitalized terms used in this brief have the same meaning as set forth in the Settlement Agreement.

includes Post's agreement to remove—if not previously removed—and refrain from using labeling claims like "Less Processed," "No High Fructose Corn Syrup," "Natural," "Healthy," "Smart," "Nutritious," and "Wholesome," among others. *See* SA ¶ 5. This is meaningful relief Plaintiffs and their counsel ("Class Counsel") fought hard to obtain. Combined with its substantial, non-reversionary common fund, the Court should find that the proposed Settlement falls within the range of reasonableness, and grant preliminary approval.

II. PROCEDURAL HISTORY & SETTLEMENT NEGOTIATIONS

Plaintiffs Debbie Krommenhock and Stephen Hadley filed this consumer class action on August 29, 2016 alleging Post labeled certain cereals with health and wellness claims that were misleading in light of the products' high added sugar content. *See generally* Dkt. No. 1, Compl. They asserted causes of action for violations of California's consumer protection and warranty statutes. *See id.* ¶¶ 397-412. The suit was one of three companion cases filed by their counsel on the same day against the big three cereal manufacturers.[2]

In October 2016, Post moved to dismiss the Complaint. Dkt. No. 26. Plaintiffs filed a First Amended Complaint, Dkt. No. 33, and in December 2016, Post again moved to dismiss, Dkt. No. 44. It was fully briefed in late January 2017, Dkt. Nos. 50 & 56, and during a February hearing, the Court indicated it would allow some claims to proceed, *see* Dkt. No. 61.

In March 2017, Post retained new counsel, Dkt. No. 66, who in May 2017 travelled to San Diego to meet with Plaintiffs' counsel, primarily to discuss the possibility of an early resolution. Dkt. No. 84 at 1; *see also* Fitzgerald Decl. ¶ 4. The parties requested and the Court allowed a period of limited discovery targeted toward negotiating a settlement, *see* Fitzgerald Decl. ¶ 4; Dkt. No. 84 at 1-2, 17; Dkt. No 85, and the parties scheduled a mediation for October 9, 2017, in San Francisco, with the Hon. Edward A. Infante (Ret.), Dkt. No. 87.

In June 2017, the Court granted in part and denied in part Post's motion to dismiss the First Amended Complaint. *Krommenhock v. Post Foods, LLC*, 255 F. Supp. 3d 938, 944-50 (N.D. Cal. 2017) (Orrick, J.) ["*Krommenhock I*"]. Plaintiffs filed a Second Amended Complaint in September 2017. Dkt. No. 92.

Before attending the mediation with Judge Infante, in September 2017 Class Counsel commissioned

[2] The other cases were *Hadley v. Kellogg Sales Co.*, 16-cv-4955-LHK (N.D. Cal., filed Aug. 29, 2016), and *Truxel v. Gen. Mills Sales, Inc.*, No. 16-cv-4957-JSW (N.D. Cal., filed Aug. 29, 2016).

a "mock trial" style focus group to learn how the San Franciscans that might make up the jury reacted to the claims and the defenses that Post, Kellogg, and General Mills had articulated by then. Fitzgerald Decl. ¶ 5. In early October, Plaintiffs provided Judge Infante and Post with a 31-page mediation brief, supported by 33 exhibits, containing a detailed assessment of the case and making clear they would settle only with a substantial, non-reversionary common fund and labeling commitments tied to the amount of added sugar in the challenged products. *Id.* ¶ 6. Post similarly provided Judge Infante and Plaintiffs with a 24-page mediation brief in which it argued Plaintiffs' claims were baseless and contested Plaintiffs' ability to show common representations, materiality, falsity, injury, and damages. *Id.* ¶ 7. But while the parties and mediator were thus well informed, the case did not settle; rather, it was apparent the parties were far apart. *Id.* ¶ 8.

In November 2017, Post moved to dismiss Plaintiffs' Second Amended Complaint. Dkt. No. 95. The motion was fully briefed in December 2017, Dkt. Nos. 102 & 104. During a January 2018 hearing the Court again indicated it would allow some claims to proceed, *see* Dkt. No. 106, issuing a written decision in March 2018. *Krommenhock v. Post Foods, LLC*, 2018 WL 1335867 (N.D. Cal. Mar. 15, 2018) (Orrick, J.).

In April 2018, Post filed its Answer, Dkt. No. 122, after which there was extensive fact and expert discovery. *See* Fitzgerald Decl. ¶¶ 9-15. Yet, the parties were cooperative, with only a single motion to compel filed: Post's, seeking Plaintiffs' medical information, Dkt. No. 125, which the Court denied. *Krommenhock v. Post Foods, LLC*, 2018 WL 4203660 (N.D. Cal. Aug. 30, 2018) (Orrick, J.).[3]

To see whether a global resolution could be reached in *Krommenhock*, *Hadley*, and *Truxel*, Plaintiffs' counsel invited Post, Kellogg, and General Mills to attend a mediation in November 2018 in Chicago, with the Hon. James F. Holderman (Ret.), former Chief Judge of the Northern District of Illinois. Fitzgerald Decl. ¶ 18. Although this case did not settle, some progress was made, *id.*, and Plaintiffs and Post continued to discuss settlement informally, exchanging multiple injunctive relief proposals in early 2019, *id.* ¶ 19. Once the parties were getting relatively close on injunctive relief, they contemplated going back to mediation. But when they again began discussing monetary terms, it became clear that would not be productive. *Id.*

In April 2019, Plaintiffs moved for class certification. Dkt. No. 141. Discovery closed on June 21, 2019, and a week later, Post moved for summary judgment. Dkt. No. 163. Together with corresponding *Daubert* motions, the parties submitted "hundreds of pages of briefs and thousands of pages of exhibits."

[3] Nevertheless, the substantive law and motion practice in the case was extensive. Fitzgerald Decl. ¶¶ 16-17.

Krommenhock v. Post Foods, LLC, 2020 WL 2322993, at *1 (N.D. Cal. May 11, 2020) (Orrick, J.) ["*Krommenhock V*"]. On March 9, 2020, the Court certified a California class, appointed Plaintiffs Class Representatives and their counsel Class Counsel, and largely denied Post's Motion for Summary Judgment. *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552 (N.D. Cal. 2020) ["*Krommenhock IV*"]. Post sought leave to file a reconsideration motion and certification for interlocutory appeal under 28 U.S.C. § 1292(b). Dkt. Nos. 230-31. In May 2020, the Court denied those motions. *Krommenhock V*, 2020 WL 2322993. Post then sought permission under Rule 23(f) to appeal the Court's class certification order, Dkt. No. 243, which the Ninth Circuit denied in July 2020, Dkt. No. 246.

In the meanwhile, the parties "reached agreement as to a number of issues" affecting trial, *see* Dkt. No. 244, filing in June 2020 a stipulation to decertify certain subclasses, *see* Dkt. No. 245; *see also* Dkt. Nos. 251, 253. Nevertheless, disputes remained about the correct Class Period and the fate of Plaintiffs' claims for equitable monetary relief in light of the Ninth Circuit's decision in *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834 (9th Cir. 2020). *See* Dkt. No. 247 at 1-8. During an August 11, 2020 Case Management Conference, the Court asked the parties to brief these issues and largely adopted their proposed pretrial schedule, setting trial to begin April 12, 2021. *See* Dkt. No. 249. The Court also referred the parties to a magistrate judge for a settlement conference in December 2020. *Id.*

In August 2020, the parties submitted their positions on the proper Class Period. Dkt. Nos. 252 & 254. The Court agreed with Plaintiffs that it should extend through class notice, rather than when Post began disclosing the amount of added sugar, but said Post could "explore[] at trial" the "impact and level of materiality" of its disclosures, and "may argue at trial that its added sugar disclosure cuts off liability at the point it was included on its products given its alleged materiality to the reasonable consumer." *Krommenhock v. Post Foods, LLC*, 2020 WL 5793454, at *1 (N.D. Cal. Aug. 25, 2020) (Orrick, J.).

On August 31, 2020, Post filed a Motion for Judgment on the Pleadings relating to Plaintiffs' claims for equitable restitution. Dkt. No. 258. Plaintiffs opposed, Dkt. No. 261, and the motion was fully briefed in September, Dkt. No. 263. On September 29, 2020, the Court granted Post's motion but gave Plaintiffs the opportunity to amend their Complaint so that their claims could ultimately proceed. *See* Dkt. No. 264. Plaintiffs accordingly filed a Third Amended Complaint ("TAC") in October 2020, Dkt. No. 273, which is the currently-operative pleading. In the meanwhile, the parties were assigned to Chief Magistrate Judge

Joseph C. Spero for a Settlement Conference on December 1, 2020. *See* Dkt. Nos. 250, 259-60.

Throughout the summer of 2020, to prepare for trial, Class Counsel reviewed every document Post had ever filed, to extract its key and peripheral defenses. Fitzgerald Decl. ¶ 20. In September, Class Counsel retained Winning Works, a leading research-based trial consulting firm, to begin framing the case for a jury. *Id.* ¶ 21. It conducted two focus groups in November 2020, each 2 ½ hours and comprised of consumers from the relevant jury pool in and around San Francisco. *Id.* In September 2020, Class Counsel also hired a skilled courtroom animation company, High Impact, to work with Dr. Lustig to develop animations for trial that would depict and help Dr. Lustig explain the complex scientific evidence in an engaging and clear manner. *Id.* & Ex. 2. And Class Counsel was discussing with another animation company the possibility of preparing summary exhibits for trial, for example regarding the product labels. *Id.*

On November 17, 2020, Plaintiffs provided to Judge Spero and Post a detailed Settlement Conference Statement and settlement demand, which included monetary and injunctive relief. *Id.* ¶ 22. Post countered and provided a redacted version of its Settlement Conference Statement to Plaintiffs. *Id.* ¶ 23.

Although the parties were quite far apart when the conference began on December 1, with Judge Spero's help, they reached a partial agreement after several hours. *Id.* ¶ 24. Over the next two weeks, they agreed on all other material terms, executing a term sheet on December 16, 2020, more than four years after the case was filed, and less than five months before trial. *Id.*; *see also* Dkt. No. 283. They then reduced the term sheet to the Settlement Agreement now presented to the Court for approval. Fitzgerald Decl. ¶ 24.

III. THE SETTLEMENT

A. The Settlement Class

The Settlement Class is comprised of all persons who, between August 29, 2012 and November 2, 2020 (the "Class Period"), purchased in the United States, for household use and not for resale or distribution, one of the Class Products. SA ¶ 1.5, 1.8 & Appx. 1 (identifying Class Products).

B. Benefits for the Settlement Class

1. Post will Establish a $15 Million Non-Reversionary Settlement Fund

As consideration for Class Members' release, Post will establish a $15 million non-reversionary common fund (the "Settlement Fund") to pay Class Notice and Claims Administration; Court-approved attorneys' fees, expenses, and service awards; and Class Member claims. SA ¶ 2.1.

Because of the nature and ubiquity of the Class Products, and the nature of the Class's damages, typically less than a dollar per unit, the parties developed a claims process that would fairly compensate Class Member claimants and ensure a seamless claims and distribution process. *See* Fitzgerald Decl. ¶¶ 47-53. To obtain monetary relief, a Class Member must submit an online or hard copy Claim Form. SA ¶ 4.1. After providing identifying information, the claimant will be asked to select the Class Products purchased since August 2012, and to state their approximate number of purchases of each product in a typical three-month period and the year they began purchasing. *Id.* ¶ 4.1(a)-(b). An equation running behind the scenes will then determine the extrapolated number of each Class Product purchased by the claimant during the Class Period, subject to per-product caps based on a reasonable average use for the products. The equation will then calculate a "Base Damages" amount by multiplying the number of units of each Class Product purchased by a standard damages amount for each unit derived from the Class's price premium damages models. *See id.* ¶ 4.1(c). If a claimant submits proof of purchase of more than four units of a product in a given month (regardless of size), the claimant's Base Damages will be increased by the standard damages amount of the purchases identified therein exceeding the 4-box-per-month cap. *See id.*

Claimants will then be divided into Base Damages quintiles. For each quintile, the average damage amount will be calculated, which will be the amount of Cash Award provided to the claimants in that quintile. *Id.* Cash Awards are subject to *pro rata* reductions or increases if claims exceed or are less than the money remaining in the Settlement Fund after all expenses. *Id.* ¶ 4.1(d), 4.5. Given the other Settlement expenses and predicted claims rate, the average Cash Award is predicted to be $14.25. Fitzgerald Decl. ¶ 66. Amounts remaining uncleared 180 days after Cash Awards are distributed will be provided to Class Member claimants in a supplemental distribution, if practicable, or donated *cy pres*. *Id.* ¶ 4.7. The parties agree and request that the Court order any such *cy pres* funds be divided equally among the American Heart Association, the National Advertising Division of the Better Business Bureau, and the UCLA Resnick Center. SA ¶ 4.7. These organizations' activities are sufficiently tethered to Plaintiffs' claims. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 866-67 (9th Cir. 2012); *compare* Fitzgerald Decl. ¶ 67.

2. Post will Make Substantial Labeling Commitments, Saving the Class Millions

As part of the Settlement, Post has agreed to refrain from using several challenged claims through at least December 31, 2022 if more than 10% of a product's calories come from added sugar. *See* SA ¶ 5.

In some cases, Post has agreed to remove and refrain from using claims Plaintiffs tested for damages. The measurements of these claims' market values were through damages models that survived Post's *Daubert* and *Comcast* challenges. This work was for trial, and Plaintiffs and their experts labored to ensure it provided as reliable a reasonable "approximation" of damages as possible, as required by California law. *See Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1183 (9th Cir. 2017), *rev'd on other grounds*, 139 S. Ct. 710 (2019). Thus, some of the agreed-upon injunctive relief has concrete, measurable value, and it is reasonable to use the price premia that survey expert, Steven Gaskin, measured to estimate the Settlement Class's future savings due to the Settlement's injunctive relief.[4] Here, damages expert Colin B. Weir has testified that, for the injunctive relief whose value can be reasonably approximated, the measurable future savings is at least approximately $22.7 million per year. *See* Weir Decl. ¶¶ 2-5 & Tables 1, 2, and 3.

C. Class Notice and Claims Administration

Following a thorough vetting process, *see* Fitzgerald Decl. ¶¶ 43-46, subject to the Court's approval, the Parties have retained Postlethwaite & Netterville ("P&N") as the Class Administrator to effect Class Notice and Claims Administration. *See* SA ¶ 6.1 (listing duties of Class Administrator). P&N has been administering class action notice and claims since 1999, and has extensive experience in state and federal courts. *See* Schwartz Decl. ¶¶ 2-5. Several courts in this District have approved P&N as a class administrator. *See id.* Ex. B.

The Settlement provides that Class Notice will be effectuated through a Notice Plan designed by the Class Administrator to comply with the requirements of Rule 23 and approved by the Parties and Court. SA ¶ 6.3. P&N has offered a Notice Plan that meets these requirements. *See* Schwartz Decl. ¶¶ 19-39; *see also infra* Point IV(C). On behalf of Post, P&N will also serve CAFA notice upon the appropriate officials within 10 days after the filing of this motion, as required by 28 U.S.C. § 1715(b). *See* SA ¶ 6.5.

D. The Settlement's Release

Upon the Effective Date, each Class Member who has not opted out will be deemed to have released Post and related entities from past, present, and future claims the Class Member has or may have against Post that, as set forth in *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010), arise out of or relate to the facts

[4] The remaining injunctive relief is also likely to save the Class money on the Class Products over time, but we do not speculate as to its potential additional value to the Class.

alleged or the claims asserted in the Action. *See* SA ¶ 8.1.

E. Opting Out

Class Members who wish to be excluded must submit a Request for Exclusion (or "Opt-Out Form") to the Class Administrator, postmarked no later than the Opt-Out Deadline. "Mass" or "class" opt-outs are not permitted. All Class Members who submit a timely, valid Request for Exclusion will not be bound by the terms of the Agreement, whereas all Class Members who do not submit a timely, valid Request for Exclusion will be bound by the Agreement and any Judgment. *Id.* ¶ 6.6.

F. Objecting

Settlement Class Members wishing to object must, by the Objection Deadline, file or mail their written objections to the Court. *Id.* ¶ 6.7(a); *see also* Settlement Guidelines, Preliminary Approval ¶ 5. An objection must contain (i) a caption or title that clearly identifies this action, and that the document is an objection; (ii) information sufficient to identify and contact the objecting Class Member or his or her attorney, if represented; (iii) information sufficient to establish the person's standing as a Settlement Class Member; (iv) a clear and concise statement of the Class Member's objection, as well as any facts and law supporting the objection; (v) the objector's signature; and (vi) the signature of the objector's counsel, if any. SA ¶ 6.7(b). Class Members who object through an attorney must sign either the Objection themselves, or execute a separate declaration authorizing the Objection. *See id.* ¶ 6.7(c). Class Members who both object and opt out will be deemed to have opted out, and thus be ineligible to object. *Id.* ¶ 6.7(d). To appear at the Final Approval Hearing, objecting Class Members must file with or send to the Court by the Objection Deadline a notice of intention to appear. *Id.* ¶ 6.7(e). The parties have the right, but not the obligation to respond to any objections. *See id.* ¶ 6.7(g).

G. Attorneys' Fees, Costs, and Service Awards

At least 35 days before the Objection Deadline, Plaintiffs will file a Motion for Attorneys' Fees, Costs, and Service Awards to be paid from the Settlement Fund. *Id.* ¶ 3.1. Approval of the Settlement's other provisions do not depend on the Court awarding any particular amount of fees, expenses, or service awards. *Id.* ¶ 3.4.[5]

[5] The Settlement Agreement includes a "quick pay" provision for attorneys' fees. *See id.* ¶ 3.2. These help deter meritless objections and are routinely approved in this District. *See In re Yahoo! Inc. Customer Data*

H. Timeline

Assuming the Court grants preliminary approval, the following proposed schedule gives absent Class Members sufficient time to receive Notice of the Settlement, and to make a claim, opt out, and object after reviewing Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards. *See In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010); Settlement Guidelines, Preliminary Approval ¶ 9 ("The parties should ensure that class members have at least thirty-five days to opt out or object to the settlement and the motion for attorney's fees and costs.").

Event	Day	Approx. Weeks After Preliminary Approval	Example Assuming PA Granted February 24, 2021
Date Court grants preliminary approval	1	-	Wednesday, Feb. 24, 2021
Deadline to commence 63-day notice period	21	3 weeks	Wednesday, March 17, 2021
Deadline for Plaintiffs to file Motion for Attorneys' Fees, Costs, and Service Awards	49	7 weeks	Wednesday, April 14, 2021
Notice completion date, and deadline to make a claim, opt out, and object	84	12 weeks	Wednesday, May 19, 2021
Deadline for Plaintiffs to file Motion for Final Approval	103	14 weeks	Monday, June 7, 2021
Final Approval Hearing	119	17 weeks	Wednesday, June 23, 2021

Sec. Breach Litig., 2020 WL 4212811, at *40 (N.D. Cal. July 22, 2020) ("[Q]uick-pay provisions have long been accepted in the appropriate circumstances." (citing *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *1 (N.D. Cal. Dec. 27, 2011) ("With respect [to] the 'quick pay' provisions, Federal courts, including this Court and others in this District, routinely approve settlements that provide for payment of attorneys' fees prior to final disposition in complex class actions." (collecting cases)))); *In re Optical Disk Drive Prod. Antitrust Litig.*, 2016 WL 7364803, at *13 (N.D. Cal. Dec. 19, 2016) ("Quick pay provisions are common practice in the Ninth Circuit." (citations omitted)); *Miller v. Ghirardelli Chocolate Co.*, 2014 WL 4978433, at *5 (N.D. Cal. Oct. 2, 2014) ("quick pay provisions are routinely approved by courts in this district" (citation omitted)).

IV. ARGUMENT

A. The Court Should Certify the Settlement Class

The Court previously found the Rule 23(a) and 23(b)(3) elements met on behalf of a Class of California consumers of Raisin Bran, Bran Flakes, Great Grains, Honey Bunches of Oats, Honey Bunches of Oats Whole Grain, Honey Bunches of Oats Granola, Alpha-Bits, Honeycomb, and Waffle Crisp. *See Krommenhock IV*, 334 F.R.D. at 561-62. The Settlement Class differs from the certified litigation Class in that (1) it is a nationwide class, rather than a California-only class, and (2) it includes additional products that were challenged in Plaintiffs' original Complaint, but not certified for litigation (since Plaintiffs did not seek certification for them), including: Great Grains Blueberry Morning, Selects Blueberry Morning (which subsequently became Great Grains), a few additional Honey Bunches of Oats varieties, Shredded Wheat Honey Nut and Crunch!, and Golden Crisp.

1. The Requirements of Rule 23(a) are Satisfied

a. Numerosity

The Court has already found that numerosity was satisfied when considering only California purchasers because the evidence "demonstrate[ed] that each of the proposed subclasses contain thousands of putative Class Members." *Krommenhock IV*, 334 F.R.D. at 562. The Settlement Class is estimated at 20.9 million households. Schwartz Decl. ¶ 16. Accordingly, numerosity is satisfied.

b. Commonality

Rule 23(a)(2) is satisfied if "there are questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), which means "class members 'have suffered the same injury,'" so that their claims "depend upon a common contention . . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quotation omitted). The Court has already found that "Plaintiffs identif[ied] . . . facts supporting commonality[]" and "[f]ollowing from these common facts, plaintiffs identify common legal questions subject to common proof, including whether the Challenged Statements were material and misleading." *Krommenhock IV*, 334 F.R.D. at 562 (record citation omitted). Nothing about the differences in the Settlement Class changes that analysis.

c. Typicality

"Under Rule 23(a)(3), a representative party must have claims or defenses that are 'typical of the

claims or defenses of the class.'" *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 1084, 1118 (N.D. Cal. 2018) (quoting Fed. R. Civ. P. 23(a)(3)). "This requirement is permissive and requires only that the representative's claims are reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Id*. (internal quotations and citation omitted). Here, Plaintiffs' claims are typical of Class Members' claims because each purchased Class Products and were exposed to the same challenged labeling claims, allegedly losing money as a result of overpaying for products containing material misrepresentations and omissions. *See Martin v. Monsanto Co.*, 2017 WL 1115167, *4 (C.D. Cal. Mar. 24, 2017) ("claims are sufficiently typical of the class claims" where "Plaintiff alleges that she and all class members were exposed to the same statement . . . and that they were all injured in the same manner"). As it did previously, the Court should find that "Plaintiffs[']claims are typical of the class claims." *Krommenhock IV*, 334 F.R.D. at 562.

d. Adequacy

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (citation omitted). Here, the Court has already found that the Law Office of Jack Fitzgerald and Sidney W. Jackson, III, and Plaintiffs Debbie Krommenhock and Stephen Hadley, are adequate Class Counsel and Class Representatives, respectively. *Krommenhock IV*, 334 F.R.D. at 562; *Krommenhock I*, 2020 WL 2322993, at *3. The Court should re-appoint the firms as Class Counsel, and Plaintiffs as Class Representatives for the nationwide Settlement Class.

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

a. Predominance

"The 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Tyson Foods, Inc. v. Bouaphakeo*, --- U.S. ----, ----, 136 S. Ct. 1036, 1045 (2016) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). Courts must "make a global determination of whether common questions prevail over individualized ones," meaning predominance "is not . . . a matter of nose-counting." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) (citing *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014)). Instead, "more important questions

apt to drive the resolution of the litigation are given more weight . . . over individualized questions which are of considerably less significance to the claims of the class." *Id.* "Therefore, even if just one common question predominates, 'the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately.'" *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 557 (9th Cir. 2019) ["*Hyundai*"] (quoting *Tyson Foods*, 136 S. Ct. at 1045). Furthermore, "whether a proposed class is sufficiently cohesive to satisfy Rule 23(b)(3) is informed by whether the certification is for litigation or settlement." *Id.* at 558; *see also Jabbari v. Farmer*, 965 F.3d 1001, 1005-1006 (9th Cir. 2020). "Confronted with a request for settlement-only certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620.

"In evaluating predominance, courts look to whether the focus of the proposed class action will be on the words and conduct of the defendants rather than on the behavior of the individual class members." *Kutzman v. Derrel's Mini Storage, Inc.*, 2020 WL 406768, at *7 (E.D. Cal. Jan. 24, 2020) (citation omitted); *accord In re Valeant Pharms. Int'l, Inc. Secs. Litig.*, 2020 WL 3166456, at *5 (D.N.J. June 15, 2020) ("[C]ommon issues predominate where [ ] 'the inquiry necessarily focuses on defendants' conduct'" (quoting *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 163 (3d Cir. 2002))). "Class actions in which a defendant's uniform policies are challenged generally satisfy the predominance requirement of Rule 23(b)(3)." *Castro v. Paragon Indus., Inc.*, 2020 WL 1984240, at *10 (E.D. Cal. Apr. 27, 2020) (citations omitted); *accord Moreno v. Beacon Roofing Supply, Inc.*, 2020 WL 1139672, at *3 (S.D. Cal. Mar. 9, 2020) (predominance satisfied where "liability would be determined by looking at Beacon's uniform policies and practices"); *In re Janney Montgomery Scott LLC Fin. Consulting Litig.*, 2009 WL 2137224, at *5 (E.D. Pa. July 16, 2009) (predominance "satisfied when plaintiffs have alleged a common course of conduct on the part of the defendant." (citation omitted)).

"A finding of a 'common nucleus of facts and potential legal remedies' is sufficient to establish predominance," *Cortes v. Nat'l Credit Adjusters, L.L.C.*, 2020 WL 3642373, at *5 (E.D. Cal. July 6, 2020) (quoting *Hanlon*, 150 F.3d at 1022), which "is a test readily met in certain cases alleging consumer . . . fraud," *Amchem*, 521 U.S. at 625, because "the crux of each consumer's claim is that a company's mass marketing efforts, common to all consumers, misrepresented the company's product," so that a "cohesive

group of individuals suffered the same harm in the same way because of the [defendant's] alleged conduct." *See Hyundai*, 926 F.3d at 559 (predominance satisfied where "class members were exposed to uniform fuel-economy misrepresentations and suffered identical injuries with only a small range of damages").

Moreover, "a central concern of the Rule 23(b)(3) predominance test is whether 'adjudication of common issues will help achieve judicial economy.'" *Vinole v. Countrywide Home Loans*, 571 F.3d 935, 944 (9th Cir. 2009) (quoting *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1189 (9th Cir. 2001)). "Judicial economy weighs in favor of a class action where . . . liability turns on whether advertisements were false or misleading." *Johns v. Bayer Corp.*, 280 F.R.D. 551, 559 (S.D. Cal. 2012). This is because such claims "focus on the defendant's conduct, rather than the plaintiff's damages," *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009), and do "not require the court to investigate class members' individual interaction with the product." *Bradach v. Pharmavite, LLC*, 735 Fed. Appx. 251, 255 (9th Cir. 2018) (quotation omitted); *accord Sherman v. CLP Res., Inc.*, 2020 WL 2790098, at *6 (C.D. Cal. Jan. 30, 2020) ("[P]redominance is satisfied" where "the case requires determination of whether Defendants' uniformly-applied policies were lawful under California law," because "adjudication of these common issues 'will help achieve judicial economy,' further the goal of efficiency, and 'diminish the need for individual inquiry'" (quoting *Vinole*, 571 F.3d at 939)). As a result, courts regularly find predominance in settlements of consumer fraud class actions.[6]

Here, the operative Complaint challenges Post's "policy and practice of marketing high-sugar cereals with health and wellness claims" that "are deceptive because they are incompatible with the dangers of the excessive sugar consumption to which these foods contribute," TAC ¶ 2, and alleges the policy is uniform, *see id.* ¶¶ 115-16 ("Regardless of" "occasional changes in . . . product labeling and packaging," "Post has maintained . . . a policy and practice of labeling high-sugar cereals . . . with various health and wellness

[6] *See, e.g.*, *Broomfield v. Craft Brew Alliance, Inc.*, 2020 WL 1972505, at *4 (N.D. Cal. Feb. 5, 2020) (predominance satisfied where "Plaintiffs allege that all Settlement Class Members were exposed to CBA's representations on the packaging of Kona Beers, which Plaintiffs allege are deceptive and material"); *Schneider v. Chipotle Mexican Grill, Inc.*, 2020 WL 511953, at *6 (N.D. Cal. Jan. 31, 2020) ("[F]or purposes of settlement, common questions predominate here because the Settlement Class Members were exposed to uniform representations . . . and suffered the same injuries."); *Shin v. Plantronics, Inc.*, 2020 WL 1934893, at *2 (N.D. Cal. Jan. 31, 2020) ("whether . . . representations were misleading" involved "common questions [that] are central to this lawsuit and predominate over individual questions"); *Hilsley v. Ocean Spray Cranberries, Inc.*, 2020 WL 520616, at *2 (S.D. Cal. Jan. 31, 2020) ("common questions of law and fact" that "predominate over individual questions" included, *inter alia*, "whether Ocean Spray's representations . . . were false and misleading or reasonably likely to deceive consumers").

claims that suggest the cereals . . . are healthy, when they are not."). Plaintiffs further allege that "[a]lthough [they] were the victim[s] of Post's longtime and general policy and practice with respect to the cereals . . . they purchased and labels they saw, . . . [their] claims are not so limited; rather, plaintiffs seek . . . to enjoin Post's *policy and practice generally*, including but not necessarily limited to the products, labels, and label claims challenged herein." *Id.* ¶ 119. Predominance is satisfied by these allegations.

Moreover, label claims Plaintiffs challenged appear on all products included in the Settlement Class. Fitzgerald Decl. ¶ 2. Plaintiffs also asserted an omissions theory that applies to all Class Products, and this separately presents predominating common questions. *See Butler v. Porsche Cars N. Am., Inc.*, 2017 WL 1398316, at *10 (N.D. Cal. Apr. 19, 2017) ("exposure and reliance suitable for class-wide resolution . . . where the class was defined as all purchasers" and plaintiffs' "claims were based on information omitted from the product's packaging."). "In these cases, all class members were 'necessarily exposed' to the defendant's omissions on the package prior to purchase . . . ." *Id.* (citing *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1105 (C.D. Cal. 2015) (collecting cases)). This is true even absent uniform exposure to an affirmative misrepresentation. In *Torres*, for example, the Ninth Circuit held that where "the crux of Plaintiffs' legal challenge involves a common failure to disclose information, and not merely a disparate series of affirmative statements," the "conduct at issue [wa]s reasonably uniform," so that common questions predominated. 835 F.3d at 1137-38. Accordingly, even if the labels included in the Settlement Class varied and did not uniformly contain challenged affirmative misrepresentations—which they do—the Court should still find common questions predominate by virtue of the omission claims, including under 21 C.F.R. § 1.21(a)(2). *See* TAC ¶¶ 239, 259-60; *compare Hodsdon v. Mars, Inc.*, 891 F.3d 857, 861 (9th Cir. 2018) ("Omissions may be the basis of claims under California consumer protections laws," where "'contrary to a representation actually made" or "a fact the defendant was obliged to disclose.'" (added emphasis omitted) (quoting *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824 (2006)).

"[W]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis." *Hanlon*, 150 F.3d at 1022 (quotation omitted). That is the case here. The Court should thus find that the Settlement Class satisfies the predominance requirement.

b. Superiority

"A consideration of the[] factors [set forth in Rule 23(b)(3)(A)-(D)] requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under [Rule 23(b)(3)] are those that can be adjudicated most profitably on a representative basis." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (quotation omitted). The superiority requirement "is met '[w]here recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis.'" *Tait*, 289 F.R.D. at 486; *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). That is true of both the certified California class, and the Settlement Class, since members of both classes stand to recover an amount easily dwarfed by the costs of litigation. Just as the Court previously found "Plaintiffs have satisfied the superiority requirement," for the California class, *Krommenhock IV*, 334 F.R.D. at 567 (citations omitted), the Court should find the Settlement Class satisfies the superiority requirement.

B. The Court Should Approve the Proposed Settlement

> Preliminary approval of a settlement and notice to the class is appropriate if "[1] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls within the range of possible approval."

In re Yahoo! Inc. Customer Data Sec. Breach Litig., 2019 WL 387322, at *4 (N.D. Cal. Jan. 30, 2019) (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citing Manual for Complex Litigation (Second) § 30.44)). "The proposed settlement need not be ideal, but it must be fair and free of collusion, consistent with a plaintiff's fiduciary obligations to the class." *Walsh v. CorePower Yoga LLC*, 2017 WL 589199, at *6 (N.D. Cal. Feb. 14, 2017) (citing *Hanlon*, 150 F.3d at 1027).

1. The Settlement is the Product of Serious, Informed, Non-Collusive Negotiations

That the Settlement was reached only after significant discovery, class certification and summary judgment orders, and with trial less than five months away, demonstrates it resulted from arms'-length negotiations. *See Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1122, 1127 (9th Cir. 2020) (case being "nearly [at] the close of discovery" indicated "the settlement's substantive fairness"); *In re Chinese-Manufactured Drywall Prods. Liability Litig.*, 424 F. Supp. 3d 456, 486 (E.D. La. 2020) (

> Counsel on both sides have zealously advocated for their clients for . . . years, as evidenced by the extensive discovery, motions practice, and significant resources expended in this

> case. The parties entered the negotiation with the experience and institutional knowledge necessary to successfully negotiate on behalf of their clients, and the settlement was accordingly achieved as a result of the adversarial process.).

Moreover, while the Settlement Class is broader than the certified California class, Plaintiffs having had obtained certification before negotiating a settlement demonstrates its substantive fairness. *See Campbell*, 951 F.3d at 1121-22 ("case does not implicate the 'higher standard of fairness' that applies when parties settle a case before the district court has formally certified *a* litigation class," because the settlement was "'negotiated by *a* court-designated class representative'" (emphasis added[7]) (quotation omitted)).

In addition, the Settlement was negotiated over three mediations, with the assistance of Judges Infante and Holderman, and with Chief Magistrate Judge Spero ultimately helping the parties in reaching their agreement. *See* Fitzgerald Decl. ¶¶ 18-24. *Compare Campbell*, 951 F.3d at 1122, 1125 ("that the settlement was the result of four in-person arms'-length mediations before two different mediators" and that the "case was extremely hard-fought, and settled at an advanced procedural stage" indicated "the settlement's substantive fairness" (internal quotation marks omitted)); *Hale v. Manna Pro Prod., LLC*, 2020 WL 3642490, at *11 (E.D. Cal. July 6, 2020) ("extensive discovery and arms-length, mediator-guided negotiations all suggest the settlement agreement is not the product of collusion"); *In re Zynga Inc. Secs. Litig.*, 2015 WL 6471171, at *9 (N.D. Cal. Oct. 27, 2015) (The "use of mediator and significant discovery practice 'support the conclusion that the Plaintiff was appropriately informed in negotiating a settlement.'" (citation omitted)); *Harris v. Vector Mktg. Corp.*, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) (use of mediator "suggests . . . [the settlement] was not the result of collusion or bad faith"); *Sherman*, 2020 WL 2790098, at *9 (

> Counsel . . . have vigorously litigated . . . resulting in over 570 docket entries . . . . have attended at least five mediations[,] and engaged in extensive settlement negotiations. [citation]. The parties came to this settlement after conducting significant amounts of investigation and discovery, allowing them to fully assess the value of the claims involved. . .. In other words, only after significant discovery, the use of a mediator, and intense motions practice did the parties enter into the Settlement. That order and process matters . . . .).

There are also none of the "subtle signs" of collusion that the Ninth Circuit identified in *In re*

[7] This suggests that if a district court certifies a statewide class, it need not apply a "heightened standard" of scrutiny, even if the settlement covers a broader, nationwide class. *Compare Harvey v. Morgan Stanley Smith Barney LLC*, 2020 WL 1031801, at *2 (N.D. Cal. Mar. 3, 2020) (Orrick, J.) ("[A] heightened scrutiny standard applies to pre-class certification settlements.").

Bluetooth Headset Prods. Liability Litig. present. *See* 654 F.3d 935, 947 (9th Cir. 2011). Nothing in the Agreement purports to entitle counsel to "a disproportionate distribution of the settlement" (and Class Members *are* to "receive[] [a] monetary distribution"); nothing returns unawarded fees to Post; and the Settlement Agreement includes no "clear sailing" agreement, instead providing only that counsel will apply to the Court for fees, imposing no conditions on Post's response, and making the fee determination independent of the Settlement's other provisions. *See* SA ¶ 3.4. "[T]he prospect of fraud or collusion is substantially lessened where, as here, the settlement agreement leaves the determination and allocation of attorney fees to the sole discretion of the trial court." *Chinese Drywall*, 424 F. Supp. 3d at 486. Here, "[b]ecause the parties have not agreed to an amount of attorney fees and instead [will] merely petition[] the Court for an award they believe is appropriate, there is no threat of the issue tainting the fairness of the settlement negotiations." *See id.*; *Sherman*, 2020 WL 2790098, at *9 ("Attorneys' fees will be paid by . . . the Gross Settlement Amount, so the case does not present a 'clear sailing' arrangement.").[8]

Finally, the excellent nature of the Settlement, *see* Fitzgerald Decl. ¶¶ 40-42, demonstrates it was achieved through vigorous litigation, rather than collusion, since "cash . . . is a good indicator of a beneficial settlement," *Rodriguez v. W. Pub'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009), and a sign that Class Counsel did not subvert the Class's interests to Post's "in exchange for red-carpet treatment on fees," *see Bluetooth*, 654 F.3d at 947 (quotation omitted).

2. The Settlement Does Not Grant Preferential Treatment Improperly

The Settlement does not treat the Class Representatives or any Class Members preferentially, since every Class Member who makes a claim, including the Class Representatives, will be subject to the same claims process that provides the same remedy based on the claimant's purchase history. That the Class Representatives will move for service awards does not change this analysis. *See Harris*, 2011 WL 1627973, at *9 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); *Rodriguez*, 563 F.3d at 958-69).

3. The Settlement Falls within the Range of Possible Approval

"To evaluate the range of possible approval criterion, which focuses on substantive fairness and

[8] Similarly, no other agreements have been made in connection with the proposal, Fitzgerald Decl. ¶ 2, so there is no possibility such an agreement "may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others." Fed. R. Civ. P. 23(e), advisory committee note (2003 amendment).

adequacy, courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer." *Harris*, 2011 WL 1627973, at *9 (quoting *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009) (citation omitted)).

> Additionally, to determine whether a settlement is fundamentally fair, adequate, and reasonable, the Court may preview the factors that ultimately inform final approval: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members to the proposed settlement.

Id. (citing *Churchill Village v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (citation omitted)).

a. The *Churchill Village* Factors Favor Preliminary Approval

An initial analysis of the *Churchill Village* factors favors preliminary approval.

The Strength of Plaintiffs' Case and ***the Risk, Expense, Complexity, and Duration of Further Litigation.*** Plaintiffs and their counsel believe this case was strong on the merits, and the Settlement reflects that. But the case was by no means perfect or without risk. *See generally* Fitzgerald Decl. ¶¶ 25-39.

Regarding liability, Post had numerous arguments for why it would be difficult or impossible for Plaintiffs to prove up their claims. Class Counsel tested these arguments in focus groups, finding some were reasonably compelling to respondents. *See id.* ¶ 32. There was also risk in Plaintiffs' damages case. For example, the vast majority of Plaintiffs' potential damages were tied up in a single product, Honey Bunches of Oats, for which Plaintiffs' claims were not as compelling as a product like Great Grains. *Id.* ¶ 28. And across the products, a single claim—the Whole Grains Council Stamp—accounted for more than 60% of damages; yet Post argued vehemently that Mr. Gaskin's measurement of this claim's price premium was fatally flawed. *See id.* ¶ 27 & n.6. Discounting damages relating to both Honey Bunches of Oats and the Whole Grains Council Stamp shrinks Plaintiffs' maximum trial damages to *just $3.7 million*. *Id.* ¶ 29.

Moreover, there was a risk the Class could lose at trial and recover nothing—as has happened in several seemingly meritorious consumer fraud class actions that have recently gone to trial in California with judgments returned for defendants. *See Farar v. Bayer AG*, Case No. 14-cv-4601 (N.D. Cal.); *Allen v. Hyland's, Inc.*, No. 12-cv-1150 DMG (MANx) (C.D. Cal.); *cf. Racies v. Quincy Bioscience, LLC*, No. 15-cv-292 (N.D. Cal.) (declaring mistrial and decertifying class). To this end, a major consideration in settling

was the potential effect of the COVID-19 pandemic. Not only did it threaten to delay trial, but Class Counsel's focus groups showed it has resulted in attitudinal challenges to Plaintiffs' case. *See* Fitzgerald Decl. ¶ 35.

On the other hand, trial would also have been complex and expensive, as the Court has said itself. *See Krommenhock IV*, 334 F.R.D. at 566 ("[P]laintiffs' challenge to so many Challenged Statements across so many product lines *does* make litigation of this case – and plaintiffs' burden of proof at trial – complex," and "plaintiffs have a complex case to prove given its breadth and scope," since they "will need to prove that reasonable consumers would be misled by each particular label used for each Product during the class period . . . ."); *see also Krommenhock V*, 2020 WL 2322993, at *3 (Granting Plaintiffs' motion to appoint additional class counsel "given that the expert work and trial in this case will be extensive and complex." (record citation omitted)). To best present the case, Class Counsel was already investing in jury consultation and courtroom animations—which would have come at significant expense—and likely would have soon hired another consultant to help prepare some witnesses for trial. *See* Fitzgerald Decl. ¶¶ 21, 40 & n.13.

Even if Plaintiffs were successful at trial, numerous appeal issues remained, presenting both inherent risk and substantial delay. *See id.* ¶¶ 36-39.

These factors thus weigh in favor of preliminary approval. *See Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 832 (N.D. Cal. 2017) (Orrick, J.) (Approving settlement where "[c]ase law suggests that plaintiff would have faced challenges in continuing to litigate" and "[i]n most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."); *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *4 (N.D. Cal. July 11, 2014) (Orrick, J.) (factor favored approval where "plaintiffs have established that there are significant risks in entering a protracted litigation," such as an "anticipated appeal" because "[a]voiding such unnecessary and unwarranted expenditure of resources and time would benefit all parties, as well as conserve judicial resources").

The Risk of Maintaining Class Action Status Through Trial. A "district court may decertify a class at any time." *Rodriguez*, 563 F.3d at 966. This Court did so recently, at least in part. *Allen v. ConAgra Foods, Inc.*, 2019 WL 5191009 (N.D. Cal. Oct. 15, 2019) (Orrick, J.). This factor thus favors approval of the Settlement. *See Edwards v. Nat'l Milk Producers Fed'n*, 2017 WL 3623734, at *7 (N.D. Cal. June 26, 2017) (factor "support[ed] final approval" where "defendants vigorously opposed class certification, including an

appeal to the Ninth Circuit").[9]

The Settlement Amount. The Settlement amount is excellent compared to other settlements for this type of case. *See* Fitzgerald Decl. ¶ 41. As discussed below, the amount is also reasonable in relation to the Settlement Class's potential recovery. *See infra* Point IV(B)(3)(b).

The Extent of Discovery Completed and Procedural Posture. Because discovery was completed, and only trial remained, "the parties ha[d] sufficient information to make an informed decision about settlement." *See Linner v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (citation omitted). This factor thus favors preliminary approval. *See*, *e.g.*, *Harvey v. Morgan Stanley Smith Barney LLC*, 2019 WL 4462653, at *1 (N.D. Cal. Sept. 5, 2019) (Orrick, J.) (granting preliminary approval where "significant investigation, research, formal and informal discovery, analysis, and litigation have been conducted such that counsel for the Parties at this time are able to reasonably evaluate their respective positions").

The Experience and Views of Counsel. "The Ninth Circuit recognizes that 'parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation.'" *Knapp*, 283 F. Supp. 3d at 833 (quoting *Rodriguez*, 563 F.3d at 967). Accordingly, in determining whether a settlement is fair and reasonable, "[t]he opinions of counsel should be given considerable weight both because of counsel's familiarity with th[e] litigation and previous experience with cases." *Larsen*, 2014 WL 3404531, at *5.

Class Counsel has considerable experience in consumer class actions, and particularly those involving the false advertising of foods, especially as healthy. Moreover, counsel has been litigating several similar

[9] Further, even complete success at trial would leave Class Members outside California uncompensated. For even the possibility of obtaining the nationwide relief conferred by the Settlement, Class Counsel or other attorneys would have to file and prosecute actions in all other states since, given the existing legal precedents, it is virtually impossible that the claims of the nationwide Settlement Class could ever be adjudicated in a single forum and trial. *See*, *e.g.*, *Warner v. Toyota Motor Sales, U.S.A., Inc.*, 2016 WL 8578913, at *12 (C.D. Cal. Dec. 2, 2016) ("Nationwide class certification under the laws of multiple states can be very difficult for plaintiffs' counsel." (citing *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 590-94 (9th Cir. 2012); *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 94 (D. Mass. 2008) (noting that "[w]hile numerous courts have talked-the-talk that grouping of multiple state laws is lawful and possible, very few courts have walked the grouping walk")))); *Rodriguez v. Bumble Bee Foods, LLC*, 2018 WL 1920256, at *3 (S.D. Cal. Apr. 24, 2018) (That "[t]he parties acknowledge[d] that obtaining a nationwide class may be difficult in light of recent case law . . . . weigh[ed] in favor of settlement."). Such litigation would cost the respective state classes millions of dollars to prosecute, be inherently risky, and continue for years, not including any appeals. *See* Fitzgerald Decl. ¶ 31.

cases during the pendency of this action, and thus has been exposed to a wide variety of information about the claims and defenses, and ultimately the potential upside and risks attendant to this case. Fitzgerald Decl. ¶ 42. Counsel strongly endorses the Settlement. *Id.* ¶¶ 40-42. Accordingly, this factor favors preliminary approval. *See Larsen*, 2014 WL 3404531, at *5 (factor favored settlement where "Plaintiffs' counsel ha[d] successfully represented consumers both as litigation class and settlement class counsel numerous times, including cases involving food mislabeling," and "believe[d] approval [wa]s in the best interests of the putative settlement class."); *Carter v. XPO Logistics, Inc.*, 2019 WL 5295125, at *3 (N.D. Cal. Oct. 18, 2019) (Orrick, J.) ("Class Counsel are experienced counsel who, after weighing all of the risk factors endorse the proposed settlement," which favored approval).

Governmental Participation. There is no governmental participant, so this factor is inapplicable. *See, e.g.*, *In re Yahoo Mail Litig.*, 2016 WL 4474612, at *7 (N.D. Cal. Aug. 25, 2016).

Class Member Reaction. Because the class has not yet been notified of the Settlement, "[t]he Court must wait until the final approval hearing to assess class members' reactions to the settlement." *See Gaudin v. Saxon Mortg. Servs., Inc.*, 2015 WL 4463650, at *6 (N.D. Cal. July 21, 2015).

b. The Monetary Relief is Fair in Relation to Potential Damages

Here, Plaintiffs and Class Counsel secured for the Settlement Class direct monetary benefits of $15 million, which is reasonable in relation to the Settlement Class's potential damages. If at trial Plaintiffs successfully established liability for all claims and products certified, their maximum price premium damages would have been $57.9 million. *See* Fitzgerald Decl. ¶ 26. The $15 million common fund is 25.9% of this amount. The Settlement, however, is on behalf of a nationwide class. Assuming sales are proportional to population, with California representing 12%, the maximum hypothetical nationwide damages would be $482.5 million, and the common fund would represent 3.1% of this amount. This "confirm[s]" the "reasonableness of the Settlement," since "[d]istrict courts have approved settlements as being in good faith for payment of 3% of an alleged tortfeasor's potential liability." *Heim v. Heim*, 2014 WL 1340063, at *6 (N.D. Cal. Apr. 2, 2014) (citing *Chevron Envt'l. Mgmt. Co. v. BKK Corp.*, 2013 WL 5587363, at *3 n.2 (E.D. Cal. Oct. 10, 2013) (approving settlement representing less than 3% of total clean-up costs)).[10]

[10] *See also In re Toys R Us-Del., Inc.-Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453-54 (C.D. Cal. 2014) (approval of settlement providing about 3% of possible recovery); *Reed v. 1-*

That analysis, however, is oversimplified because, as discussed above, the overwhelming majority of damages were attributable to just a few of Plaintiffs' most vulnerable claims—their challenges to the Whole Grains Council Stamp and statements on Honey Bunches of Oats. Accounting for these risks, the fairness of the relief obtained in relation to Plaintiffs' likely recovery at trial is even more apparent. *See* Fitzgerald Decl. ¶¶ 27-29. For example, discounting damages attributable to the WGC Stamp, the $15 million common fund represents 66.7% of the California class's damages, and 8% of the nationwide class's damages. Discounting damages attributable to Honey Bunches of Oats, the $15 million common fund would represent 146% of the remaining $10.3 million damages for the California Class, and 17.5% of corresponding nationwide damages. Discounting *both*, the $15 million common fund represents more than 405% of the remaining $3.7 million in damages, and 48.6% of proportionate nationwide damages. *Cf. Harvey*, 2020 WL 1031801, at *6 (where there are "substantial risks as to [certain] claims," it is "reasonable for Plaintiffs' counsel to assign no or little value to these claims when considering the overall full-verdict value."). In addition, the amount of this Settlement is comparable to that reached in *Hadley*, which settled a similar amount of sales, but where Plaintiffs had already established Kellogg's liability for some statements. *See* Fitzgerald Decl. ¶¶ 33-34.

c. The Injunctive Relief is Appropriate and Meaningful

Plaintiffs and Class Counsel fought hard to obtain the Settlement's substantial injunctive relief, which appropriately addresses what Plaintiffs have always maintained are the most explicit ways in which Post represents that the challenged cereals are healthy. This includes restricting or limiting references to statements like "less processed," "good for you," "whole foods," "no high fructose corn syrup," "health benefits," "natural," "healthy," "smart snack," "nutritious," and "wholesome." *See* SA ¶¶ 5.1 – 5.11.

"[T]here is a high value to the injunctive relief obtained" in consumer class actions resulting in

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800 Contacts, Inc., 2014 WL 29011, at *6 (S.D. Cal. Jan. 2, 2014) (approval of settlement providing 1.7% of possible recovery); *Custom LED, LLC v. eBay, Inc*, 2014 WL 2916871, at *4 (N.D. Cal. June 24, 2014) ("courts have held that a recovery of only 3% of the maximum potential recovery is fair and reasonable"); *In re Endosurgical Prod. Direct Purchaser Antitrust Litig.*, 2008 WL 11504857, at *6 (C.D. Cal. Dec. 31, 2008) (approving "settlement [] worth approximately 1.7% of relevant sales"); *McCabe v. Six Continents Hotels, Inc.*, 2015 WL 3990915, at *10 (N.D. Cal. June 30, 2015) (preliminary approval of settlement representing between 0.3% and 2% of potential recovery); *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 581 & n.5 (E.D. Pa. 2003) (approval of settlement where recovery was 1.62% of sales (collecting cases)); *cf. In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000), *as amended* (June 19, 2000) ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." (citation omitted)).

labeling changes." *See Bruno v. Quten Research Inst., LLC*, 2013 WL 990495, at *4 (C.D. Cal. Mar. 13, 2013). This benefits not just Class Members, but also "the marketplace and competitors who do not mislabel their products." *Id*. The relief obtained here is especially noteworthy because it prohibits Post from making certain health and wellness claims based on the contribution of added sugar to the products' calories.

d. The Court will be Empowered to Determine Reasonable Fees, Costs, and Service Awards

Though "[t]he court will not approve a request for attorneys' fees until the final approval hearing, [ ] class counsel should include information about the fees they intend to request and their lodestar calculation in the motion for preliminary approval." Settlement Guidelines, Preliminary Approval ¶ 6. Here, Class Counsel anticipates petitioning the Court for a fee award of no more than $5 million, based on the common fund method of calculation. This is one-third (33⅓%) of the Settlement Fund, and a smaller portion of the Settlement's total value considering its injunctive relief.[11] "[A] fee award of one-third is within the range of awards in this Circuit." *In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *4 (N.D. Cal. Sept. 20, 2018) (Orrick, J.) (collecting cases).[12]

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[11] Courts may include the amount of injunctive relief that directly benefits Class Members when deciding an appropriate attorneys' fees award when its value is "mathematically ascertainable." *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 472 (1980); *see also Staton*, 327 F.3d at 945–46 (where value "from injunctive relief can be accurately ascertained," courts may "include such relief as part of the value of a common fund for purposes . . . of determining fees."). But even when the injunctive relief cannot be precisely quantified, "the district court can, based on the record, determine the significance of this benefit, and employ it as a qualitative factor in deciding whether a multiplier is warranted." *Chambers v. Whirlpool Corp.*, 980 F.3d 645, 664 (9th Cir. 2020); *see also Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1055-56 (9th Cir. 2019) ("injunctive relief" is "a relevant circumstance to consider in determining what *percentage* of the fund is reasonable as fees" (citation omitted)); *In re Atmel Corp. Derivative Litig.*, 2010 WL 9525643, at *10-12 (N.D. Cal. Mar. 31, 2010) (considering prospective relief as a factor justifying departure from the 25% benchmark).

[12] *See also Morris v. Lifescan, Inc*., 54 F. App'x 663, 664 (9th Cir. 2003) (affirming 33% fee award); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (same); *Villafan v. Broadspectrum Downstream Servs., Inc.*, 2020 WL 6822908, at *2 (N.D. Cal. Nov. 20, 2020) (granting preliminary approval to settlement allocating "attorney's fees of no more than one third of the Gross Settlement Amount"); *Philips v. Munchery Inc.*, 2020 WL 6135996, at *9 (N.D. Cal. Oct. 19, 2020) (granting preliminary approval where "Class Counsel indicates that they plan to seek one-third of the settlement amount for attorneys' fees"); *Schneider*, 2020 WL 511953, at *4, *9 (Granting preliminary approval where "counsel requests fees of $1,950,000," which did "not to exceed one third of the settlement fund ($1,950,000)" because Class Counsel "assume[d] substantial risk in litigating this action on a contingency fee basis, and incurring costs without the guarantee of payment for its litigation efforts. Further, the agreement does not contemplate a disproportionate cash allocation between counsel and the class").

In support of the fee application, Class Counsel will argue and evidence, *inter alia*, that the following factors support the request: the excellent benefits obtained for the class; the quality of representation; the complexity and novelty of the issues presented; and the contingent nature of the representation and risk of nonpayment as evidenced by, for example, the results of *Truxel* and *Clark v. Perfect Bar, LLC*. *See* Fitzgerald Decl. ¶¶ 36-38.

While invoking the common fund method, Class Counsel's application will evidence, for an optional lodestar cross-check,[13] over 4,590 hours of time into the case for a lodestar of over $2.7 million, such that the request, if granted, would represent an approximately 1.82 multiplier. *See* Fitzgerald Decl. ¶ 78 & Exs. 24-25. By comparison, a fee that "results in a multiplier [of] 2.75-3.0 . . . falls within the range of fee multipliers courts routinely approve," *see Wolf v. Permanente Med. Group, Inc.*, 2018 WL 5619801, at *2-3 (N.D. Cal. Sept. 14, 2018) (collecting cases).

In addition, "[a]ttorneys who create a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class." *Vincent v. Reser*, 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013); *see also* Fed. R. Civ. P. 23(h). Here, Class Counsel anticipates seeking reimbursement of expenses of up to $986,400, the majority of which relates to expert witness expenses, plus any additional costs incurred after preliminary approval. *See* Fitzgerald Decl. ¶ 79 & Exs. 29-30.

Finally, Plaintiffs will petition the Court for service awards of $7,500 each for Class Representatives Debbie Krommenhock and Stephen Hadley, evidencing their substantial time into the matter, the personal risks they faced, and their contributions to this sizable settlement. *See*, *e.g.*, *Alvarez v. Farmers Ins. Exch.*, 2017 WL 2214585, at *1 (N.D. Cal. Jan. 18, 2017) (Orrick, J.) ("$10,000 service award for each of the named Plaintiffs is reasonable and appropriate" where "Plaintiffs . . . assisted Class Counsel in the litigation of this case" and "took a significant risk by becoming a class representative in this action").

4. The Settlement has No Obvious Deficiencies

Plaintiffs and Class Counsel submit that, given the foregoing, there are no obvious deficiencies in the

[13] *See In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017) (district court is not required to do a lodestar cross-check); *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 547 (9th Cir. 2016) ("[A] cross-check is entirely discretionary . . . ."); *Bolton v. U.S. Nursing Corp.*, 2013 WL 5700403, at *5 (N.D. Cal. Oct. 18, 2013) ("In a common fund case, a lodestar method does not necessarily achieve the stated purposes of proportionality, predictability and protection of the class and can encourage unjustified work and protracting the litigation.").

Settlement. *See Dickey v. Advanced Micro Devices, Inc.*, 2019 WL 4918366, at *5 (N.D. Cal. Oct. 4, 2019); *contra. Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 967 (N.D. Cal. 2019) (finding "a number of obvious deficiencies that prevent the Court from granting preliminary approval at this time").

C. The Court Should Approve the Class Notice and Notice Plan

"Due process requires adequate notice before the claims of absent class members are released." *Yahoo!*, 2019 WL 387322, at *5 (citing *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015)). "Rule 23 requires only the 'best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'" *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128-29 (9th Cir. 2017) (quoting Fed. R. Civ. P. 23(c)(2)(B)). P&N's proposed Notice Plan is reasonable under the circumstances. It includes targeted print and online ads, and will reach an estimated minimum 70% of Class Members, and more than twice each. *See* Schwartz Decl. ¶ 20; *see also Edwards*, 2017 WL 3623734, at *4 ("[N]otice plans estimated to reach a minimum of 70 percent are constitutional and comply with Rule 23."). In addition, the Notice Plan includes sending emails to approximately 68,000 individuals who are likely Class Members and for whom Post has email addresses.

The proposed Notice itself is also appropriate, since it contains "information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." *See In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977). The Notice sufficiently informs Class Members of (1) the nature of the litigation, the Settlement Class, and the identity of Class Counsel, (2) the essential terms of the Settlement, including the gross settlement award and net settlement payments class members can expect to receive, (3) how notice and administration costs, court-approved attorneys' fees, costs, and service awards will be paid from the Settlement Fund, (4) how to make a claim, opt out, or object to the Settlement, (5) procedures and schedules relating to final approval, and (6) how to obtain further information. *See* SA Ex. 1, Long Form Notice. The Notice also satisfies the Settlement Guidelines' requirements to advise Class Members of the Settlement Website, and instructions on how to access the case docket. *See id.*

V. CONCLUSION

The Court should certify the Settlement Class, appoint Class Representatives and Class Counsel, preliminarily approve the Settlement, and set a schedule and procedures through Final Approval.

Dated: January 18, 2021

Respectfully Submitted,

/s/ Jack Fitzgerald

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Class Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEBBIE KROMMENHOCK and STEPHEN HADLEY, on behalf of themselves, all others similarly situated, and the general public,

Plaintiffs,

v.

POST FOODS, LLC,

Defendant.

Case No. 5:16-cv-04958-WHO

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Judge: Hon. William H. Orrick

WHEREAS, the above-entitled action is pending before this Court (the "Action");

WHEREAS, Plaintiffs Debbie Krommenhock and Stephen Hadley have moved, pursuant to Federal Rule of Civil Procedure 23(e), for an order approving the Settlement of this Action in accordance with the Class Action Settlement Agreement ("Settlement Agreement") attached as Exhibit A to the Declaration of Jack Fitzgerald in Support of Plaintiffs' Motion for Preliminary Approval of Class Settlement (the "Motion"), which Settlement Agreement sets forth the terms and conditions for a proposed classwide settlement of the Action;

WHEREAS, the Court, has read and considered the Settlement Agreement, Plaintiffs' Motion, and the arguments of counsel;

NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

1. Settlement Terms. All capitalized terms herein have the same meanings ascribed to them in the Settlement Agreement.

2. Jurisdiction. The Court has jurisdiction over the subject matter of the action and over all parties to the action, including all members of the Settlement Class.

3. Preliminary Approval of Proposed Settlement Agreement. The Court finds that, subject to the Final Approval hearing, the proposed Settlement Agreement is fair, reasonable, adequate, and within the range of possible approval considering the possible damages at issue and defenses to overcome. The Court also finds that the Settlement Agreement: (a) is the result of serious, informed, non-collusive, arms-length negotiations, involving experienced counsel familiar with the legal and factual issues of this case and made with the assistance and mediation services of Hon. Edward A. Infante (Ret.), Hon. James F. Holderman (Ret.), and Chief Magistrate Judge Joseph C. Spero; and (b) meets all applicable requirements of law, including Federal Rule of Civil Procedure 23, and the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715. Therefore, the Court grants preliminary approval of the Settlement.

4. Class Certification for Settlement Purposes Only. The Court conditionally certifies, for settlement purposes only, a Class defined as all persons in the United States who, between August 29, 2012 and November 2, 2020 (the "Class Period"), purchased in the United States, for household use and not for resale or distribution, any of the Class Products identified in Appendix 1 to the Settlement Agreement.

5. The Court finds, for settlement purposes only, that class certification under Federal Rule of Civil Procedure 23(b)(3) is appropriate in the settlement context because (a) the Settlement Class Members are so numerous that joinder of all Settlement Class Members is impracticable; (b) there are questions of law and fact common to the Settlement Class which predominate over any individual questions; (c) the claims of the Plaintiffs and proposed Class Representatives are typical of the claims of the Settlement Class; (d) the Plaintiffs and proposed Class Representatives and their counsel will fairly and adequately represent and protect the interests of the Settlement Class Members; (e) questions of law or fact common to the Settlement Class Members predominate over any questions affecting only individual Settlement Class Members; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

6. Class Representatives. The Court appoints Plaintiffs Debbie Krommenhock and Stephen Hadley as Class Representatives.

7. Class Counsel. The Court appoints The Law Office of Jack Fitzgerald, PC and Jackson and Foster, LLC as Class Counsel.

8. Settlement Class Administrator. The Court hereby approves Postlethwaite & Netterville ("P&N") to act as Class Administrator. P&N shall be required to perform all the duties of the Class Administrator as set forth in the Agreement and this Order.

9. Qualified Settlement Fund. P&N is authorized to establish the Settlement Fund under 26 C.F.R. §§ 1.468B-1(c) and (e)(1), to act as the "administrator" of the Settlement Fund pursuant to 26 C.F.R. § 1.468B-2(k)(3), and to undertake all duties as administrator in accordance with the Treasury Regulations promulgated under § 1.468B of the Internal Revenue Code of 1986. All costs incurred by the Class Administrator operating as administrator of the Settlement Fund shall be construed as costs of Claims Administration and shall be borne solely by the Settlement Fund. Interest on the Settlement Fund shall inure to the benefit of the Class.

10. Class Notice. The Court approves the form and content of the Class Notice in the long form attached to the Settlement Agreement as Exhibit 1, the short form attached to the Settlement Agreement as Exhibit 2, and the other forms of notice submitted with Plaintiffs' Motion for Preliminary Approval. The Court finds that dissemination of the Class Notice as proposed in the Settlement Agreement and in P&N's

Notice Plan as set forth in the January 18, 2021 Declaration of Brandon Schwartz meets the requirements of Federal Rule of Civil Procedure 23(c)(2), and due process, and further constitutes the best notice practicable under the circumstances. Accordingly, the Court hereby approves the Notice Plan.

11. The Court recognizes that Defendant Post Foods, LLC ("Post") has collected approximately 68,400 individual customer email addresses that that likely include some Settlement Class Members. The Court further recognizes that Post's privacy policy generally prohibits it from sharing personal information, such as these names and emails, to unrelated third parties, but allows for disclosure "required by law" or "in response to a lawful request by public authorities." In order to achieve "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified with reasonable effort," Fed. R. Civ. P. 23(c)(2), the Court orders that: (i) Post produce the approximately 68,400 individual customer names and email addresses that it has collected to P&N; (ii) P&N use the individual customer names and email addresses solely for the purpose of disseminating Class Notice in this case and no other purpose; and (iii) P&N maintain the confidentiality of the individual customer names and email addresses and not disclose them to any person outside of P&N except as necessary to disseminate Class Notice in this case.

12. Objection and Exclusion Deadline. Settlement Class Members who wish either to object to the Settlement or to exclude themselves from the Settlement must do so by the Objection Deadline and Exclusion Deadline of _____, 2021 both of which are sixty-three (63) calendar days after the Settlement Notice Date. Settlement Class Members may not both object to and exclude themselves from the Settlement. If a Settlement Class Member submits both a Request for Exclusion and an Objection, the Request for Exclusion will be controlling.

13. Exclusion from the Settlement Class. To submit a Request for Exclusion, Settlement Class Members must follow the directions in the Notice and send a compliant request to the Class Administrator at the address designated in the Class Notice, postmarked by the Exclusion Deadline. To be valid, the Request for Exclusion must (i) be in writing and mailed; (ii) contain the name of this Action, *Krommenhock v. Post Foods, LLC*, No. 5:16-cv-04958-WHO, (iii) contain the full name and address of the Settlement Class Member; (iv) state that the Settlement Class Member wishes to be excluded by the Settlement; and

(v) be signed individually by the Settlement Class Member or his or her attorney. No Request for Exclusion may be made on behalf of a group of Settlement Class Members.

14. All Settlement Class Members who submit a timely, valid Request from Exclusion will be excluded from the Class and will not be bound by the terms of the Settlement Agreement and any determinations and judgments concerning it. All Settlement Class Members who do not submit a valid Request for Exclusion by _____, 2021 in accordance with the terms set forth in the Agreement, will be bound by all determinations and judgments concerning the Agreement.

15. Objections to the Settlement. To object to the Settlement, Settlement Class Members are encouraged to follow the directions in the Notice and file or mail to the Court a written Objection by the Objection Deadline. In the written Objection, the Settlement Class Member should include (i) a caption or title that clearly identifies the Action and that the document is an objection, (ii) the Settlement Class Member's name, current address, and telephone number, or—if objecting through counsel—his or her lawyer's name, address, and telephone number, (iii) the Class Product(s) the Settlement Class Member bought during the Class Period, (iv) a clear and concise statement of the Class Member's objection, as well as any facts and law supporting the objection, (v) if the Class Member (or his or her lawyer) wishes to appear and speak at the Final Approval Hearing, a statement to that effect, (v) the objector's signature, and (vi) the signature of the objector's counsel, if any. The Parties will have the right to obtain document discovery from and take depositions of any objecting Settlement Class Member on topics relevant to the Objection.

16. If a Settlement Class Member does not submit a written Objection to the Settlement or to Class Counsel's application for attorneys' fees and costs or the Service Awards in accordance with the deadline and procedure set forth in the Notice and this Order, but the Settlement Class Member wishes to be appear and be heard at the Final Approval Hearing, the Settlement Class Member may do so provided the Objector satisfies the requirements of Federal Rule of Civil Procedure 23(e)(5)(A) at the Final Approval Hearing.

17. Objecting Settlement Class Members may appear at the Final Approval Hearing and be heard. If an objecting Class Member chooses to appear at the Final Approval Hearing, a notice of intention to appear should be filed with the Court or postmarked no later than the Objection Deadline.

18. All members of the Settlement Class, except those who submit timely Requests for Exclusion, will be bound by all determinations and judgments in this Action, whether favorable or unfavorable to the Settlement Class.

19. Submission of Claims. To receive a cash award, Settlement Class Members must follow the directions in the Notice and file a claim with the Class Administrator by the Claims Deadline of _____, 2021, which is sixty-three (63) calendar days after the Settlement Notice Date. Settlement Class Members who do not submit a claim will not receive a cash award but will be bound by the Settlement.

20. Schedule of Future Events. The Court adopts the schedule proposed by Plaintiff, as follows (with Day "1" the date of this Order):

Event	Day	Approximate Weeks After Preliminary Approval
Date of Preliminary Approval Order	1	-
Deadline to commence 63-day notice period	21	3 weeks
Deadline for Plaintiffs to file Motion for Attorneys' Fees, Costs, and Incentive Awards	49	7 weeks
Notice completion date, and deadline to make a claim, opt out, and object	84	12 weeks
Deadline for Plaintiffs to file Motion for Final Approval	102	15 weeks
Final Approval Hearing	116	17 weeks

21. Final Approval Hearing. A Final Approval Hearing is scheduled for _____, 2021, at 2:00 p.m., for the Court to determine whether the proposed settlement of the Action on the terms and conditions provided for in the Settlement Agreement is fair, reasonable, and adequate to the Settlement Class and should be finally approved by the Court; whether a Judgment should be entered; and to determine any amount of fees, costs, and expenses that should be awarded to Class Counsel and the amount of any service awards to Plaintiffs. The Court reserves the right to adjourn the date of the Final Approval Hearing without further notice to the members of the Settlement Class, and retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement. The Court may approve the

Settlement, with such modifications as may be agreed to by the settling Parties, if appropriate, without further notice to the Settlement Class.

22. Stay of Proceedings. All proceedings in this action are stayed until further order of this Court, except as may be necessary to implement the Settlement or comply with the terms of the Settlement Agreement.

23. Pending the final determination of whether the Settlement should be approved, the Settlement Class Representatives and all Settlement Class Members are hereby stayed and enjoined from commencing, pursuing, maintaining, enforcing, or prosecuting, either directly or indirectly, any Released Claims in any judicial, administrative, arbitral, or other forum, against any of the Released Parties. Such injunction will remain in force until Final Approval or until such time as the Parties notify the Court that the Settlement has been terminated. Nothing herein will prevent any Settlement Class Member, or any person actually or purportedly acting on behalf of any Settlement Class Member(s), from taking any actions to stay or dismiss any Released Claim(s). This injunction is necessary to protect and effectuate the Agreement, this Preliminary Approval Order, and the Court's flexibility and authority to effectuate the Agreement and to enter Judgment when appropriate, and is ordered in aid of this Court's jurisdiction and to protect its judgments. This injunction does not apply to any person who files a Request for Exclusion.

24. If the Settlement is not approved or consummated for any reason whatsoever, the Settlement and all proceedings in connection with the Settlement will be without prejudice to the right of Defendant or the Class Representatives to assert any right or position that could have been asserted if the Agreement had never been reached or proposed to the Court, except insofar as the Agreement expressly provides to the contrary. In such an event, the certification of the Settlement Classes will be deemed vacated. The certification of the Settlement Classes for settlement purposes will not be considered as a factor in connection with any subsequent class certification issues.

25. No Admission of Liability. By entering this Order, the Court does not make any determination as to the merits of this case. Preliminary approval of the Settlement Agreement is not a finding or admission of liability by Defendant. Furthermore, the Agreement and any and all negotiations, documents, and discussions associated with it will not be deemed or construed to be an admission or evidence of any violation of any statute, law, rule, regulation, or principle of common law or equity, or of

any liability or wrongdoing by Defendant, or the truth of any of the claims. Evidence relating to the Agreement will not be discoverable or used, directly or indirectly, in any way, whether in this Action or in any other action or proceeding, except for purposes of demonstrating, describing, implementing, or enforcing the terms and conditions of the Agreement, this Order, the Final Approval Order, and the Judgment.

26. Retention of Jurisdiction. The Court retains jurisdiction over the Action to consider all further matters arising out of or connected with the Settlement Agreement and the settlement described therein.

IT IS SO ORDERED.

Dated: _____, 2021

_____
Hon. William H. Orrick
United States District Judge