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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 FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Judge:	Hon. William H. Orrick
Hearing Date:	June 23, 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 June 23, 2021, at 2:00 p.m., Plaintiffs will move the Court, the Honorable William H. Orrick presiding, for an Order (1) finally certifying the Settlement Class; (2) finally approving the Settlement as fair, reasonable, and adequate to the Class; (3) directing the parties to undertake the obligations set forth in the Settlement Agreement that arise out of the Court's final approval; (4) entering Judgment; and (5) maintaining jurisdiction over this matter for purpose of enforcing the Judgment.

The Motion is based on this Notice of Motion; the below Memorandum; the concurrently-filed declarations of Jack Fitzgerald ("Fitzgerald Decl.") and Brandon Schwartz ("Schwartz Decl."), and all exhibits thereto; the parties' January 15, 2021 Settlement Agreement ("SA");[1] all prior pleadings and proceedings; and any additional evidence and argument submitted in support of the Motion.

ISSUES TO BE DECIDED

Whether the Court should finally certify the Settlement Class, grant the proposed Settlement final approval, direct the parties to undertake the obligations set forth in the Settlement Agreement, enter Judgment, and maintain jurisdiction over the matter for purpose of enforcing the Judgment.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

On February 24, 2021, the Court preliminarily approved a nationwide class action settlement between Plaintiffs Debbie Krommenhock and Stephen Hadley, and Defendant Post Foods, LLC. *See Krommenhock v. Post Foods, LLC*, 2021 WL 750823, at *1 (N.D. Cal. Feb. 24, 2021) (Finding the "proposed Settlement Agreement appears to be fair, reasonable, adequate," "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 "appears to meet all applicable requirements of law."). The Settlement resolves allegations that Defendant violated California's Unfair Competition Law, False Advertising Law,

[1] Dkt. No. 286-1, Ex. 1 to Declaration of Jack Fitzgerald in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("PA Fitzgerald Decl.")

Consumers Legal Remedies Act, and breached warranties by misleadingly and unlawfully marketing high-sugar cereals with health and wellness claims. *See* Dkt. No. 273, Third Am. Compl. ("TAC"), ¶ 2.

Notice has now been provided to the Class in accordance with the approved Notice Plan. This included (1) direct email notice to more than 69,000 likely Class Members for whom the Class Administrator, P&N, was provided emails by Post, and follow-up emails for recipients who had not filed a claim, and for any Class Members who had started but not completed a claim (for a total of 161,610 successful email deliveries); (2) a media notice plan resulting in 336,956,657 digital impressions (almost 7 million more than the Court-approved Notice Plan anticipated); (3) publication notice in *People* Magazine and a press release through PR Newswire's US1 and National Hispanic Newsline, picked up by 140 media outlets, reaching a total potential audience of 58,000,000; and (4) notices with third-party websites TopClassActions.com and ClassAction.org, which drove 230,880 class members to the Settlement Website. *See* Schwartz Decl. ¶¶ 6-13 & Exs. B-E. As a result, the Notice Plan "delivered a 72.14% reach with an average frequency of 2.12," for "a total reach *exceeding* the originally estimated 70% reach." *Id.* ¶ 27. The Settlement Website and toll-free hotline (IVR) that P&N set up also received significant use. *See id.* ¶¶ 15, 20 (As of June 9, 2021, more than 555,000 unique users have made more than 2.8 million views of the Settlement Website, and hundreds of calls have been made to the IVR).

The Class's response to the Settlement has been overwhelmingly positive. While 335,816 Class Members made valid claims, only two opted out, and none have objected. *Id.* ¶¶ 21-25.[2] If the Court awards the full amount of attorneys' fees, costs, service awards, and Class Administrator fees requested, claimants will receive between approximately $3.05 and $73.25, depending on their quintile, *see id.* ¶ 23 & Table 3,

[2] P&N received a letter titled "Notice of Objection," but it does not comply with the procedural requirements for objecting, and—more importantly—does not lodge any actual objection to the Settlement. Instead, the author asks to "be compensated by greater means than the approved settlement thus far," or for an "additional settlement" for "medical bills" he incurred when "forced to consume [the class products] in order to survive" while in the hospital battling serious disease. While the story is sympathetic, nothing in the letter actually addresses, much less calls into question the fairness, reasonability, or adequacy of Class Members releasing their *economic* claims for *false advertising* (not personal injury) in the Settlement. *Compare Edenborough v. ADT, LLC*, 2019 WL 4164731, at *3 (N.D. Cal. July 22, 2019) (Construing "letter attached to a notice of claim form . . . as an objection," but finding the "concern f[ell] outside of scope of the settlement."). Although the letter is not a proper or valid objection, in the interest of candor and abundance of caution, Plaintiffs asked P&N to attach it for the Court's review. *See* Schwartz Decl. Ex. F.

with an average refund of approximately $25.28, *see* Fitzgerald Decl. ¶ 2. This exceeds the parties' $14.25 estimate. *See* Dkt. No. 286, PA Fitzgerald Decl. ¶¶ 65-66.

As reflected by the high number of claims, few exclusions, and lack of objections, this is a fair, reasonable, and adequate result for the Class, while eliminating inherent risk after more than four years of hotly-contested litigation, and less than five months away from trial.[3] Because the settlement provides an excellent result for the Class and eliminates the risk and expense of continued litigation and lengthy appeals, Plaintiffs respectfully request the Court grant the Settlement final approval and enter Judgment.

II. LEGAL STANDARD

"Judicial policy favors settlement in class actions and other forms of complex litigation where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation." *Espinosa v. Cal. Coll. of San Diego, Inc.*, 2018 WL 1705955, at *5 (S.D. Cal. Apr. 9, 2018) (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1387 (D. Ariz. 1989)). A class action settlement must be approved by the Court before it can become effective. *See* Fed. R. Civ. P. 23(e). The process for court approval of class action settlements is comprised of three steps: (1) preliminary approval, (2) dissemination of notice to the class which provides class members the opportunity to object or opt out and, (3) a final approval hearing, at which the court decides whether the proposed settlement should be approved as fair, adequate, and reasonable to the class and whether plaintiff's request for attorneys' fees, expense reimbursement and service awards should be approved. *See* Manual for Complex Litigation (Fourth) § 21.632-35; *see also In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 721680, at *16 (N.D. Cal. Jan. 28, 2016). The first two steps are complete; Plaintiffs now seek an Order finally approving the Settlement.

"To determine whether a settlement agreement meets these standards, a district court must consider a number of factors," including: (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

[3] The full procedural, litigation, and settlement history was detailed in Plaintiffs' Motion for Preliminary Approval. *See* Dkt. No. 285 at 2-5 ["PA Mot."]. The Court should finally certify the Settlement Class for the same reasons set forth in that motion. *See Cancilla v. Ecolab, Inc.*, 2016 WL 54113, at *2 (N.D. Cal. Jan. 5, 2016) ("[C]onclusion[]" at preliminary approval stage that settlement class should be certified "hold[s] at this final stage.").

experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 830 (N.D. Cal. 2017) (Orrick, J.) (citing *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) ["*Bluetooth*"]). The Court need not weigh all of the factors, "and different factors may predominate in different factual contexts." *Rieckborn v. Velti PLC*, 2015 WL 468329, at *3 (N.D. Cal. Feb. 3, 2015) (Orrick, J.) (quoting *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993)). Further:

> While considering all these interests, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned."

Id., at *4 (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)).

III. THE SETTLEMENT SHOULD BE FINALLY APPROVED AS FAIR, REASONABLE, AND ADEQUATE FOR THE CLASS

A consideration of the *Churchill* factors demonstrates the Settlement is fair, reasonable, and adequate, thus warranting final approval.

A. The Strength of the Case, and the Risk, Expense, Complexity, and Likely Duration of Further Litigation

"In determining whether the settlement is fair, reasonable, and adequate" the Court first "balance[s] the risks of continued litigation, including the strengths and weaknesses of plaintiff's case, against the benefits afforded to class members, including the immediacy and certainty of recovery." *Knapp*, 283 F. Supp. 3d at 831-32. (citing *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *4 (N.D. Cal. July 11, 2014); *LaGarde v. Support.com, Inc.*, 2013 WL 1283325, at *4 (N.D. Cal. Mar. 26, 2013)). Given "all the normal perils of litigation as well as the additional uncertainties inherent in complex class actions," *see In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 179-80 (5th Cir. 1979), "unless [a proposed] settlement is clearly inadequate," a court should normally find "its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Knapp*, 283 F. Supp. 3d at 832 (citing *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (internal quotation marks omitted)); *see also Rojas v. Zaninovich*,

2015 WL 3657172, at *12 (E.D. Cal. June 11, 2015) (Courts consider, among other things, the "normal perils of litigation, including the merits of the affirmative defenses asserted by Defendant, the difficulties of complex litigation, [and] the lengthy process of establishing specific damages.").

Here, "[w]hile [ ] [P]laintiffs assert that they believe their claims are strong, they acknowledge," as detailed in their motion for preliminary approval, "that they would face significant risks should the case proceed through litigation." *See Larsen*, 2014 WL 3404531, at *4 (record citation omitted); *compare* PA Mot. at 18-19. Post "vigorously denied liability and challenged all of [ ] [P]laintiffs' claims," *see id.*, and when tested in focus groups, Plaintiffs found some of Post's defenses "were reasonably compelling to respondents," PA Mot. at 18 (citing PA Fitzgerald Decl. ¶ 32). The Court also cautioned Plaintiffs this would be "a complex case to prove [at trial] given its breadth and scope," requiring "pro[of] that reasonable consumers would be misled by each particular label used for each Product during the class period," making continued litigation particularly risky and expensive. *See Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 566 (N.D. Cal. 2020); *see also Krommenhock v. Post Foods, LLC*, 2020 WL 2322993, at *3 (N.D. Cal. May 11, 2020) (noting "that the expert work and trial in this case will be extensive and complex" (record citation omitted)); *compare* PA Mot. at 18.

Even if Plaintiffs successfully proved Post's liability, "[t]here was also risk in Plaintiffs' damages case," with "the vast majority of Plaintiffs' potential damages [ ] tied up in a single product, Honey Bunches of Oats . . . [a]nd across the products, a single claim—the Whole Grains Council Stamp—account[ing] for more than 60% of damages; yet Post argued vehemently that Mr. Gaskin's measurement of this claim's price premium was fatally flawed." PA Mot. at 18 (citing PA Fitzgerald Decl. ¶¶ 27-28 & n.6). If Plaintiffs lost at trial on these issues, "the amount of damages possibly recoverable by the class would shrink dramatically," to just $3.7 million. *See* PA Fitzgerald Decl. ¶ 29; *compare Rieckborn*, 2015 WL 468329, at *5 (finding similar fact favored granting final approval). "[A]lthough [Plaintiffs'] claims were quite strong," there were clear factual challenges facing Plaintiffs at trial, including "challenges [with] [ ] damages," so the Court should find the first two *Churchill* factors weigh in favor of granting final approval. *See Nguyen v. Radient Pharms. Corp.*, 2014 WL 1802293, at *2-3 (C.D. Cal. May 6, 2014).

Here, the Settlement "achieves a definite and certain result for the benefit of the Settlement Classes," making it "preferable to continuing litigation in which the Settlement Class would necessarily confront

substantial risk, uncertainty, delay, and cost." *See Donald v. Xanitos, Inc.*, 2017 WL 1508675, at *2 (N.D. Cal. Apr. 27, 2017) (Orrick, J.). Thus, in light of "the significant risks that lie ahead . . . [at] trial, it is reasonable for the parties at this stage to agree that the actual recovery realized and risks avoided here outweigh the opportunity to pursue potentially more favorable results." *See Larsen*, 2014 WL 3404531, at *4. Because "[t]he settlement avoids the risks that the [P]laintiffs would not succeed in demonstrating that [Post] failed to comply with state consumer protection laws," "this factor weighs in favor of final approval of the settlement." *See id.*; *see also Rieckborn*, 2015 WL 468329, at *4-5 (the "first two [*Churchill*] factors weigh in favor of approval" where "Plaintiffs contend that their claims have significant merit but acknowledge a number of risks and uncertainties should they proceed," including that "Defendants have adamantly denied liability and have asserted from the outset that they possess absolute defenses to all of plaintiffs' claims," and that "[p]roving damages would also entail substantial uncertainty . . . depend[ing] . . . on which, if any, of the four alleged partial corrective disclosures plaintiffs are ultimately able to rely," making "further litigation . . . likely to be costly and time-intensive, with no guarantee of a more beneficial outcome for class members as a result").

B. The Amount of Settlement

"This factor examines the benefits to class members." *Larsen*, 2014 WL 3404531, at *4 (citing *Churchill Village*, 361 F.3d at 574). "Assessing the fairness, adequacy, and reasonableness of the amount offered in settlement is not a matter of applying a 'particular formula.'" *Knapp*, 283 F. Supp. 3d at 832 (citing *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)). Instead, "[w]hen considering the fairness and adequacy of the amount offered in settlement, 'it is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness.'" *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) (quoting *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 527). Further, "it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 527; *cf. City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) ("[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."). Finally, that a "Settlement Agreement also provides for injunctive relief" is an important consideration in evaluating its

benefit, since "class members that choose to continue doing business with [the defendant] will benefit from this aspect as well." *See Knapp*, 283 F. Supp. 3d at 833.

Here, the Settlement's $15,000,000 common fund for a nationwide Class of approximately 20.9 million Members, is fair, reasonable, and adequate, especially in light if the robust injunctive relief obtained for the Class's benefit—Post's agreement to remove, if not already removed, and to refrain from using for some time, a variety of health and wellness claims on Class Products containing more than 10% of calories from added sugar. SA ¶¶ 5.1-5.11; *see also* PA Mot. at 21-23 & n.11. Assuming the Court approves or awards the full amount of notice and administration costs, attorneys' fees and costs, and service awards requested, Class Member claimants will divide the remaining approximately $8.47 million for an average refund of approximately $25.28 per claimant. *See* Fitzgerald Decl. ¶ 2.[4] This relates favorably to the average payout of $14.25 the parties estimated in moving for preliminary approval. *See* PA Mot. at 6 (citing PA Fitzgerald Decl. ¶ 66); *compare De Leon v. Ricoh USA, Inc.*, 2020 WL 1531331, at *9 (N.D. Cal. Mar. 31, 2020) (granting final approval where "[i]n granting preliminary approval the Court concluded that the estimated payout to class members was fair in relation to the risks of continued litigation . . . and there [wa]s nothing in the final approval materials that change[d] the Court's analysis on that score").

This payout represents for the claimants a significant recovery in relation to potential trial damages, where Plaintiffs would have to show "the difference between the prices customers paid and the value of the [products] they bought—in other words, the 'price premium' attributable to [Defendant's advertising claims]." *See Brazil v. Dole Packaged Foods, LLC*, 660 F. App'x 531, 534 (9th Cir. 2016). Here, the price premiums Plaintiffs' experts calculated range from 0.75% (Honeycomb's "Nutritious" claim),[5] to 29.7% (Alpha Bits Whole Grains Council Stamp), with sales volumes ranging widely. *See* Dkt. No. 240-9, Suppl. Weir Decl., at ECF Header pp. 10-12 (unredacted version filed under seal). With average retail prices between $2.58 and $4.45, if Plaintiffs were successful at trial, damages under a price premium theory could be as low as $0.02 per purchase of Honeycomb, and at most—assuming the jury awarded the *aggregate* of all price premium damages for each product—as high as $2.00 per purchase for Bran Flakes, with an average

[4] Depending on their quintile, nearly all claimants (i.e., other than those few who submitted receipts for purchases that exceed the highest quintile) will receive the following refunds: Quintile 1: $3.05; Quintile 2: $8.47; Quintile 3: $15.24; Quintile 4: $26.06; and Quintile 5: $73.25. *See* Schwartz Decl. ¶ 23 & Table 3.

[5] This is the lowest non-zero measured price premium; one Great Grains claim showed no premium.

aggregate damages per product of $0.80 per purchase. *See* Fitzgerald Decl. ¶ 3. The Settlement provides claimants with an average cash award of $25.28 (equivalent to the average damages amount for 31.6 units), and is thus an excellent result for the Class, particularly given the risks and expenses associated with trial and appeals, *see supra* at 7-9.[6]

Because the Settlement amount is a fair, reasonable, and adequate result for the Class, this factor weighs in favor of approval. *See Broomfield v. Craft Brew Alliance, Inc.*, 2020 WL 1972505, at *9 (N.D. Cal. Feb. 5, 2020) (approving settlement where Class Members would receive between $1.25 to $2.75 per unit purchased, for a maximum of $10 without proof of purchase); *Fitzhenry-Russell v. Coca-Cola Co.*, 2019 WL 11557486, at *6 (N.D. Cal. Oct. 3, 2019) (approving settlement fund of $2,450,000 that would pay restitution of $0.80 per unit, up to $10.40 (thirteen units) without proof of purchase); *Hendricks v. Starkist Co.*, 2016 WL 5462423, at *5 (N.D. Cal. Sept. 29, 2016) (approving settlement in which class members would receive $1.97 cash or $4.43 voucher per claim, and noting that the "settlement amount, while constituting only a single-digit percentage of the maximum potential exposure, is reasonable given the stage of the proceedings and the defenses asserted"); *see also Hilsley v. Ocean Spray Cranberries, Inc.*, 2020 WL 520616, at *6 (S.D. Cal. Jan. 31, 2020) (finding $1.00 recovery per bottled purchased to be "an excellent result" considering the fraction of purchase price recoverable at trial); *Beck-Ellman v. Kaz USA, Inc.*, 2013 WL 10102326, at *6 (S.D. Cal. June 11, 2013) (Factor weighed in favor of approval where "Class members

[6] As detailed in Plaintiffs' Preliminary Approval Motion, the Settlement is also fair, reasonable, and adequate when considered on an absolute basis. Depending on what the jury determines is false (if anything), trial damages could be as little as zero dollars (for instance if the jury *only* found Great Grains "Less Processed" false and misleading), or range into the hundreds of thousands if a small subset of challenged claims are found to be false, up to potentially $57.9 million if all challenged claims were false, and the jury agreed with Plaintiffs' experts on the price premiums associated with each claim. *See* Suppl. Weir Decl. at 10 (ECF Header p. 12). At worst, the nationwide Settlement amount is approximately 25.9% of the damages that could be obtained at trial on behalf of the California Class, and 3.1% of the proportional estimated nationwide damages of $482.5 million. *See* PA Mot. at 21-21; PA Fitzgerald Decl. ¶ 26. This amount is a best-case scenario for Plaintiffs. For example, discounting damages attributable to the WGC Stamp, the $15 million common fund represents 66.7% of the California litigation class's damages, and 8% of estimated nationwide damages. Discounting damages attributable to Honey Bunches of Oats, the Settlement would represent 146% of the remaining $10.3 million damages for the California Class, and 17.5% of corresponding nationwide damages. Discounting *both*, the Settlement represents more than 405% of the remaining $3.7 million in damages, and 48.6% of proportionate nationwide damages. *Cf. Harvey v. Morgan Stanley Smith Barney LLC*, 2020 WL 1031801, at *6 (N.D. Cal. Mar. 3, 2020) (Orrick, J.) (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.").

may each recover up to $20 in reimbursements, although Kaz Heating Pads sold during the class period for around $10 to $20 per pad" and "[t]he settlement also include[d] substantial injunctive relief relating to Plaintiffs' claims, valued by economics professor Anthony Cox to be worth as much as $10,726,000." (record citations omitted)).

C. Extent of Discovery Completed and Stage of Proceedings

"This factor evaluates whether 'the parties have sufficient information to make an informed decision about settlement,'" *Knapp*, 283 F. Supp. 3d at 833 (quoting *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998)). "The extent of discovery completed and the state of the proceedings at the time of settlement is a strong indicator of whether the parties have sufficient understanding of each other's cases to make an informed judgment about their likelihood of prevailing." *Lane v. Brown*, 166 F. Supp. 3d 1180, 1190 (D. Or. 2016). Thus, "[a] court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 527 (internal quotation marks and citation omitted). "For that reason, '[a] settlement following sufficient discovery and genuine arms-length negotiation is *presumed fair*.'" *Lane*, 166 F. Supp. 3d at 1190 (emphasis added) (quoting *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528).

A presumption of fairness applies here because the parties litigated for more than four years, including extensive motion practice, fact and expert discovery were complete,[7] only trial remained, and the Settlement was reached through three in-person arms-length negotiations with the assistance of Judges Infante and Holderman, and Chief Magistrate Judge Spero. *See* PA Fitzgerald Decl. ¶¶ 9-24. Yet even absent such a presumption, it is clear that "[b]y th[e] late stage of the litigation" at which the Settlement was reached, "both sides had a strong understanding of the strengths and weaknesses of each other's case," such that this factor "strongly favors approval." *See Lane*, 166 F. Supp. 3d at 1185, 1190 (granting final approval where "[a]fter almost four years of litigation, extensive fact and expert discovery, and prior unsuccessful efforts to resolve the dispute, the parties engaged in lengthy settlement negotiations a few months

[7] This includes *inter alia*, 19 substantive motions, review of over 59,000 pages of documents, three sets of interrogatories, two sets of requests for admission, 21 depositions, 39 third-party subpoenas, and 12 expert reports, including a classwide damages analysis that survived Post's *Comcast* and *Daubert* challenges. *See* PA Fitzgerald Decl. ¶¶ 9-16.

before trial and signed a Proposed Settlement Agreement"); *see also Gaudin v. Saxon Mortgage Servs., Inc.*, 2015 WL 7454183, at *6 (N.D. Cal. Nov. 23, 2015) (factor supported final approval where plaintiff "conduct[ed] extensive discovery and investigation (before and after class certification), reviewing approximately 25,000 pages of [Defendant's] documents, and participating in three separate rounds of settlement negotiations" (internal quotation marks and record citations omitted)); *Booth v. Strategic Realty Tr., Inc.*, 2015 WL 6002919, at *5 (N.D. Cal. Oct. 15, 2015) (factor favored final approval where "among other things, [plaintiffs] review[ed] more than 150,000 pages of documents produced by Defendants and non-parties, analyz[ed], with the assistance of an expert, data produced by Defendants, prepar[ed] for and participat[ed] in mediation, and negotiat[ed] the details of the Settlement Agreement for over two months" (internal quotation marks and record citations omitted)).

D. The Experience and Views of Class 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). In determining whether a settlement is fair and reasonable, "[t]he judgment of experienced counsel regarding the settlement is [therefore] entitled to great weight." *White v. Experian Info. Sols., Inc.*, 2009 WL 10670553, at *12 (C.D. Cal. May 7, 2009) (citing *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass 1987); *Linney v. Cellular Alaska P'ship*, 1997 WL 450064, at *5 (N.D. Cal. 1997)). As a result, "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Id.* (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)).

Class Counsel here has considerable experience in consumer class actions, and particularly those involving the false advertising of foods, especially as healthy. Moreover, Class Counsel has been litigating several similar cases during the pendency of this action and has therefore been exposed to a wide variety of information about the claims and defenses, and ultimately the potential upside and risks attendant to this case. PA Fitzgerald Decl. ¶ 42. Because Class Counsel has substantial experience with complex class actions generally, as well as an intimate understanding of the specific facts and issues present here, and strongly endorse the Settlement, *id.* ¶¶ 40-42, this factor favors final approval. *See Larsen*, 2014 WL 3404531, at *5 (factor favored final approval 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).

E. The Presence of a Governmental Participant

"There is no governmental participant here." *See Knapp*, 283 F. Supp. 3d at 833. Because, however, P&N "notified officials of the proposed settlement pursuant to CAFA . . . and no government entity has raised an objection," this factor "favors settlement." *See id.* (citing *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 685 (N.D. Cal. 2016); *Holman v. Experian Info. Sols., Inc.*, 2014 WL 7186207, at *3 (N.D. Cal. Dec. 12, 2014); *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *14 (N.D. Cal. Apr. 22, 2010)); *compare* Schwartz Decl. ¶ 4.

F. The Reactions of the Class Members

"The reaction of the [C]lass to the [S]ettlement is overwhelmingly positive," with a robust 335,816 valid claims filed,[8] only *2* opt-outs, and *no objections*; this factor thus "strongly favors final approval." *See Edwards v. Nat'l Milk Producers Fed'n*, 2017 WL 3623734, at *2, *8 (N.D. Cal. June 26, 2017) (Factor favored approval where "307,396 class members had submitted claims online, and an additional 125 class members had submitted paper claim forms," yet "only eight objections and one request for exclusion were received out of the millions of class members receiving notice."), *aff'd sub nom.*, *Edwards v. Andrews*, 846 Fed. App'x 538 (9th Cir. 2021).[9] "A low number of opt-outs and objections in comparison to class size is

[8] This represents a claims rate of approximately 1.61% of the estimated 20.9 million Class Members, which is less than the 2.82% claims rate Plaintiffs predicted applying the methodology required by the Settlement Guidelines. *See* PA Fitzgerald Decl. ¶¶ 54-57. Nevertheless, as discussed below, the claims rate falls into the typical range expected in low-value consumer packaged goods class action settlements.

[9] Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, and the supporting Fitzgerald Declaration and Exhibits, were posted on the Settlement Website the same day they were filed, so that Class Members had access to the motion for five weeks before the objection deadline, but no Class Member has objected to any aspect of the motion. *See* Fitzgerald Decl. ¶ 3. After Plaintiffs filed the motion, the Ninth Circuit issued a decision holding that, "under the newly enacted Rule 23(e), federal courts must scrutinize attorneys' fees for potential collusion that shortchanges the class, even in post-class certification settlements." *Briseno v. Henderson*, --- F.3d ----. ----, 2021 WL 2197968, at *13 (9th Cir. June 1, 2021). Courts should do this by "apply[ing] the *Bluetooth* factors even for post-class certification settlements." *Id.*,

typically a factor that supports settlement approval." *Noll v. eBay, Inc.*, 309 F.R.D. 593, 608 (N.D. Cal. 2015) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness")); *see also Larsen*, 2014 WL 3404531, at *5 ("The participation rate and positive response of the class weigh[ed] in favor of finding that the settlement is favorable to the class members" where "a total of 59,830 class members [ ] submitted claim forms, twenty-three [ ] opted out, and sixteen [ ] objected"); *Zepeda v. PayPal, Inc.*, 2017 WL 1113293, at *15 (N.D. Cal. Mar. 24, 2017) ("The Ninth Circuit has held that the number of class members who object to a proposed settlement is a factor to be considered." (citing *Mandujano v. Basic Vegetable Prods. Inc.*, 541 F.2d 832, 837 (9th Cir. 1976))).

"[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members," *Larsen*, 2014 WL 3404531, at *5 (quoting *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529), and courts may thus "appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it," *id.* (quoting *Create-A-Card, Inc. v. Intuit, Inc.*, 2009 WL 3073920, at *15 (N.D. Cal. Sept. 22, 2009)). "This 'strong presumption' of fairness arises here, because . . . [no] objections and [only two] request[s] for exclusion were received out of the millions of class members receiving notice." *See Edwards*, 2017 WL 3623734, at *8; *see also* Schwartz Decl. ¶¶ 24-25; *supra* n.2.

The absence of any objections and extremely low opt-out rate—just 0.0006% of the 335,816 claims filed and 0.000009% of the estimated 20.9 million class members—strongly favors final approval here, since "[t]hese statistics indicate a favorable reaction by class members and their overall satisfaction with the Settlement." *See Noll*, 309 F.R.D. at 608 (factor favored approval where "of over 1,188,000 potential Class Members, only 97 [ ] opted out" and "only three objections were filed (including one that was not timely), translating into an objection rate of 0.00025%" (citing *Custom LED LLC v. eBay, Inc.*, 2013 WL 6114379, at *9 (N.D. Cal. Nov. 20, 2013) (granting final approval and characterizing 0.04% exclusion rate, with one

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at *5. Although Plaintiffs obtained certification of a litigation class, their Preliminary Approval motion demonstrated why the *Bluetooth* factors—which are entirely non-existent here—do not indicate collusion. *See* Dkt. No. 285, Mot. at 16-17. The analysis applies equally to their instant fee motion. *See* Dkt. No. 297.

objection, as "overwhelmingly positive" reaction); *Chun–Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal.2010) (4.86% opt-out rate strongly supported approval))); *see also Knapp*, 283 F. Supp. 3d at 833 (N.D. Cal. 2017) (factor favored final approval where "[t]he settlement administrator received valid opt-outs from 452 class members, which amount[ed] to less than .03 percent of the class members who received notice," making "[i]t [ ] apparent that the 'overwhelming majority of the class' had nothing to say about the fairness of the settlement." (quotation omitted)).[10]

While the low opt-out and nonexistent objection rates indicate the majority of the Class approved of the Settlement and chose to remain in the Settlement Class, the 1.61% claims rate is also "on par with other consumer cases, and does not otherwise weigh against approval." *See Schneider v. Chipotle Mexican Grill, Inc.*, 2020 WL 6484833, at *9 (N.D. Cal. Nov. 4, 2020) (approving settlement with 0.83% claims rate) (citing *Broomfield*, 2020 WL 1972505, at *7 (approving settlement with response rate of "about two percent")). Because "consumer class actions tend to result in claims rates in the low single digits," *Rael v. Children's Place, Inc.*, 2020 WL 434482, at *9 (S.D. Cal. Jan. 28, 2020), the Court should find that the 1.61% claims rate supports final approval here, particularly in light of the low opt-out rate and lack of objections. *See Touhey v. United States*, 2011 WL 3179036, at *7-8 (C.D. Cal. July 25, 2011) (approving settlement where only 38 claims were filed, which was "approximately 2%" claims rate, based in part on "the lack of objections"); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377-78 (S.D. Fla. 2007) (approving settlement with claims rate of about 1.2%); *see also* PA Fitzgerald Decl. Ex. 9 (discussing *Bayol v. Health-*

[10] *See also Johnson v. Quantum Learning Network, Inc.*, 2017 WL 747462, at *2 (N.D. Cal. Feb. 27, 2017) ("The lack of objections and the low rate of opt-outs (less than 1%) are 'indicia of the approval of the class.'" (citation omitted)); *Zepeda*, 2017 WL 1113293, at *15 (factor favored approval where "notice was served on approximately 100 million PayPal customers, including approximately 10.5 million Claims Class members" and "[i]n response, close to 400,000 claims . . . [were] filed," "[y]et, only eleven class members filed objections and 75 [ ] opted out" (citations omitted)); *Stonehocker v. Kindred Healthcare Operating LLC*, 2021 WL 1643226, at *5 (N.D. Cal. Apr. 27, 2021) (finding "[t]he reaction of the class was overwhelmingly positive" where "the Court received only three opt-outs and no objections"); *Thomas v. MagnaChip Semiconductor Corp.*, 2018 WL 2234598, at *2-3 (N.D. Cal. May 15, 2018) (finding "[t]he reaction of the class was overwhelmingly positive" where "[n]o class members objected, and only one class member submitted a request for exclusion"); *Jarrell v. Amerigas Propane, Inc.*, 2018 WL 1640055, at *2 (N.D. Cal. Apr. 5, 2018) (finding "[t]he reaction of the class was overwhelmingly positive" where "[n]o objections were received, and only three class members, or approximately 1% of the class, opted out." (record citation omitted)).

Ade LLC, No. 18-cv-1462 (N.D. Cal.) (approving settlement with 1.09% claim rate); *Broomfield v. Craft Brew Alliance, Inc.*, No. 17-cv-1027 (N.D. Cal.) (approving settlement with 1.83% claim rate)).

Although Plaintiffs initially estimated a claims rate of 2.82% by averaging claim rates in similar food and beverage false advertising class actions, PA Fitzgerald Decl. Exs. 9-22, the actual claim rate of 1.61% is not significantly below this estimate and, in any event, "this ratio is not dispositive and should not be given great significance because many factors affect response rates," *Bostick v. Herbalife Int'l of Am., Inc.*, 2015 WL 12731932, at *27 (C.D. Cal. May 14, 2015) (approving settlement with "response rate of less than 1%" (citation and internal quotations omitted)). Further, even where "the parties' estimated [a] claims rate at the preliminary approval stage of between five and ten percent," but the actual claims rate was "*well below* th[at] estimate[,]" final approval is appropriate where, "for those class members who did file claims, the monetary relief available appears reasonable." *see Bayat v. Bank of the W.*, 2015 WL 1744342, at *5 (N.D. Cal. Apr. 15, 2015).

G. The Risk of Maintaining Class Action Status Through Trial

"This factor, which concerns the risk of maintaining class certification, also favors settlement." *Larsen*, 2014 WL 3404531, at *4. While "[t]he Court already granted class certification," "and conditionally certified a class for settlement purposes only in granting preliminary approval," "[u]nder Federal Rule of Civil Procedure 23(c)(1)(C), an 'order that grants . . . class certification may be altered or amended before the final judgment.'" *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2017 WL 4685536, at *4 (C.D. Cal. May 8, 2017) (quoting Fed. R. Civ. P. 23(c)(1)(C)). Thus, "[a]lthough Plaintiffs believe they would be successful in maintaining class action status through trial and appeal," because Post "vigorously opposed class certification, previously filed a [23(f) petition to appeal certification], and indicated its intention to challenge certification again," "the risk that Defendant may prove successful in attacking class certification, . . . favors final approval of the Settlement Agreement." *See id.*; *see also Edwards*, 2017 WL 3623734, at *7 ("Although plaintiffs are confident the class would remain certified through trial, the risk 'was not so minimal that this factor could not weigh in favor of the settlement.'" (quotation and citation omitted)).

CONCLUSION

The Court should grant the Settlement final approval and enter Judgment.

Dated: June 9, 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. 3:16-cv-04958-WHO

DECLARATION OF JACK FITZGERALD IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

Judge:	Hon. William H. Orrick
Hearing Date:	June 23, 2021, 2:00 p.m.
Location:	Courtroom 2

I, Jack Fitzgerald, declare:

1. I am a member in good standing of the State Bars of California and New York; and of the United States District Courts for the Northern, Eastern, Central, and Southern Districts of California, the Southern and Eastern Districts of New York, and the Western District of Wisconsin; and of the United States Court of Appeals for the Second, Eighth, and Ninth Circuit Courts of Appeal. I make this Declaration based on my own personal knowledge in support of Plaintiff's Motion for Final Approval.

2. Based on the IRI data in this case, the average retail price for the Class Products ranged from $2.58 to $4.45 and, based on the price premia derived from Plaintiffs' damages analyses, damages for those products ranged from $0.02 per Honeycomb purchase, to $2.00 per Bran Flakes purchase, with an average damages amount of $0.80 per purchase. Given the 335,816 valid claims that Class Members made, if the Court awards the full amount of fees, costs, service awards, and Class Administrator fees requested, claimants will receive an average refund of approximately $25.28 as follows.

Settlement Fund	**$15,000,000**
Notice & Administration – Already Incurred	($312,702)
Notice & Administration – Estimated Additional Costs	($187,298 - $207,298)
Attorneys' Fees	($5,000,000)
Expenses	($986,400)
Service Awards	($15,000)
Remainder	$8,478,600 - $8,498,600
Claims	335,816
Remainder ÷ Claims	**$25.25 - $25.31 (avg. = $25.28)**

3. Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards ("Fee Motion"), and my supporting Declaration (Dkt. Nos. 297-98), were posted to the Settlement Website on the same day they were filed, April 14, 2021. Thus, Class Members had full access to the motion for five weeks before the objection deadline, but no Class Member has objected to any aspect of the motion.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed this 9th day of June 2021, in San Diego, California.

/s/ Jack Fitzgerald
Jack Fitzgerald

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

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND FINAL ORDER OF DISMISSAL

The Court having held a Final Approval Hearing on June 23, 2021, notice of the Final Approval Hearing having been duly given in accordance with this Court's Order Granting Preliminary Approval of the Class Action Settlement, and having considered all matters submitted to it at the Final Approval Hearing and otherwise, and good cause appearing therefore,

THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

1. Incorporation of Other Documents. The Settlement Agreement dated January 15, 2021, including its exhibits, and the definitions of words and terms contained therein are incorporated by reference in this Order. The terms of this Court's Preliminary Approval Order are also incorporated by reference in this Order.

2. Jurisdiction. This Court has jurisdiction over the subject matter of this Action and over the Parties, including all members of the following Settlement Class certified for settlement purposes in this Court's Preliminary Approval Order: 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. Excluded from the Settlement Class are all persons who validly excluded themselves from the Settlement Class according to the terms of this Court's Preliminary Approval Order.

3. Class Certification. For purposes of settlement only, the Settlement Class, as defined in the Settlement Agreement and above, meets the requirements of Federal Rule of Civil Procedure Rule 23(a) and 23(b). Accordingly, for purposes of settlement, the Court finally certifies the Settlement Class.

4. Adequate Representation. The Class Representatives and Class Counsel have adequately represented the Settlement Class in accordance with Federal Rule of Civil Procedure 23(e)(2)(A).

5. Arms-Length Negotiations. The Settlement Agreement is the product of arms-length settlement negotiations between the Plaintiffs and Class Counsel, on the one hand, and Defendant and its counsel, on the other, in accordance with Federal Rule of Civil Procedure 23(e)(2)(B).

6. Class Notice. The Class Notice and claims submission procedures set forth in Sections 4 and 6 of the Settlement Agreement and the Notice Plan filed on January 18, 2021 fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement Class Members who could be identified

through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Classes as contemplated in the Settlement Agreement and this Order. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii).

7. CAFA Notice. The notice provided by the Class Administrator to the appropriate State and federal officials pursuant to 28 U.S.C. § 1715 fully satisfied the requirements of that statute.

8. Settlement Class Response. A total of 335,816 Settlement Class Members made valid claims, and a total of 2 Settlement Class Members submitted timely and proper Requests for Exclusion, as reported in the declaration of the Class Administrator submitted to this Court. The Court hereby orders that each of the individuals who submitted valid Requests for Exclusion are excluded from the Settlement Class. Those individuals will not be bound by the Settlement Agreement, and neither will they be entitled to any of its benefits.

9. Objections. No timely and proper Objections to the Settlement Agreement were submitted. Plaintiffs faced serious risks both on the merits of their claims and on the ability to maintain certification as a litigation class in this matter. The relief provided to the Settlement Classes pursuant to the Settlement Agreement is adequate, given the costs, risks, and delay of trial and appeal, and taking into consideration the attorney's fees this Court has awarded. *See* Fed. R. Civ. P. 23(e)(2)(C)(i), (iii). The Settlement also treats class members equitably relative to each other. *See* Fed. R. Civ. P. 23(e)(2)(D).

10. Final Settlement Approval. The Court hereby finally approves the Settlement Agreement, the exhibits, and the Settlement contemplated thereby ("Settlement"), and finds that the terms constitute, in all respects, a fair, reasonable, and adequate settlement as to all Settlement Class Members in accordance with Rule 23 of the Federal Rules of Civil Procedure and directs its consummation pursuant to its terms and conditions.

11. Attorneys' Fees and Costs; Service Awards. The Court approves Class Counsel's application for $5,967,606.00 in attorneys' fees and costs, and for service awards to each Settlement Class representative in the amount $7,500.00. The Settlement Agreement provides for Class Counsel's Fee Award to be paid before the time to appeal this Order has expired. If the Fee Award is voided or reduced on appeal, either directly or as a result of the final approval of the Settlement as a whole being vacated, overturned, reversed, or rendered void as a result of an appeal, Class Counsel shall within thirty (30) days repay either to the Settlement Fund or to Post the affected amount of the attorneys' fees and costs paid to Class Counsel, in an

amount proportionate to the distribution among Class Counsel's firms, in accordance with the directions in the Settlement Agreement. By receiving any payments pursuant to the Settlement Agreement, The Law Office of Jack Fitzgerald, PC and Jackson & Foster, LLC and their shareholders, members, and/or partners submit to the jurisdiction of this Court for the enforcement of the reimbursement obligation set forth herein and in the Settlement Agreement. If Class Counsel fails to timely repay the attorneys' fees and costs that are owed under this provision, the Court shall be entitled, upon application of Post, and notice to Class Counsel, to summarily issue orders, including but not limited to judgments and attachment orders against each of Class Counsel.

12. Dismissal. The Court hereby DISMISSES WITH PREJUDICE, without costs to any party, except as expressly provided for in the Settlement Agreement, the Action, as defined in the Settlement Agreement.

13. Release. Upon the Effective Date as defined in the Settlement Agreement, the Plaintiffs and each and every one of the Settlement Class Members unconditionally, fully, and finally releases and forever discharges the Released Parties from the Released Claims. In addition, any rights of the Class Representatives and each and every one of the Settlement Class Members to the protection afforded under Section 1542 of the California Civil Code and any other similar, comparable, or equivalent laws, are terminated.

14. Injunction Against Released Claims. Each and every Settlement Class Member, and any person actually or purportedly acting on behalf of any Settlement Class Member(s), is hereby permanently barred and enjoined from commencing, instituting, continuing, pursuing, maintaining, prosecuting, or enforcing any Released Claims (including, without limitation, in any individual, class or putative class, representative or other action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum, against the Released Parties. This permanent bar and injunction is necessary to protect and effectuate the Settlement Agreement, this Final Order of Dismissal, and this Court's authority to effectuate the Settlement Agreement, and is ordered in aid of this Court's jurisdiction and to protect its judgments.

15. No Admission of Liability. The Settlement 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 admissible, 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, the Preliminary Approval Order, or this Order.

16. Findings for Purposes of Settlement Only. The findings and rulings in this Order are made for the purposes of settlement only and may not be cited or otherwise used to support the certification of any contested class or subclass in any other action.

17. Effect of Termination or Reversal. If for any reason the Settlement terminates or Final Approval is reversed or vacated, 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.

18. Settlement as Defense. In the event that any provision of the Settlement or this Final Order of Dismissal is asserted by Defendant as a defense in whole or in part to any claim, or otherwise asserted (including, without limitation, as a basis for a stay) in any other suit, action, or proceeding brought by a Settlement Class Member or any person actually or purportedly acting on behalf of any Settlement Class Member(s), that suit, action or other proceeding shall be immediately stayed and enjoined until this Court or the court or tribunal in which the claim is pending has determined any issues related to such defense or assertion. Solely for purposes of such suit, action, or other proceeding, to the fullest extent they may effectively do so under applicable law, the Parties irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of the Court, or that the Court is, in any way, an improper venue or an inconvenient forum. These provisions are necessary to protect the Settlement Agreement, this Order and this Court's authority to effectuate the Settlement, and are ordered in aid of this Court's jurisdiction and to protect its judgment.

19. Injunctive Relief. By attaching the Settlement Agreement as an exhibit and incorporating its terms herein, the Court determines that this Final Order complies in all respects with Federal Rule of Civil Procedure 65(d)(1).

20. Retention of Jurisdiction. Without affecting the finality of the Judgment, the Court reserves jurisdiction over the implementation, administration, and enforcement of the Judgment and the Agreement and all matters ancillary to the same.

21. Post-Distribution Accounting. Within 21 days after the distribution of the settlement funds and payment of attorneys' fees, the parties should file a Post-Distribution Accounting in accordance with the Northern District of California's Procedural Guidance for Class Action Settlements.

22. Entry of Judgment. The Clerk of the Court is directed to enter Judgment.

IT IS SO ORDERED.

Dated: _____, 2021

_____
Hon. William H. Orrick
United States District Judge