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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JONATHAN RETTA, KIRSTEN SCHOFIELD, and JESSICA MANIRE on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs,

v.

MILLENNIUM PRODUCTS, INC., and WHOLE FOODS MARKET, INC.,

Defendants.

Case No. 2:15-cv-01801-PSG-AJW

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

Date: July 31, 2017
Time: 1:30 p.m.
Courtroom 880

Judge: Hon. Philip S. Gutierrez

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

RULES

Plaintiffs Jonathan Retta, Kirsten Schofield, and Jessica Manire ("Plaintiffs" or "Class Representatives") respectfully submit this memorandum in support of Plaintiffs' Motion for Final Approval of Class Action Settlement.

I. INTRODUCTION

On January 31, 2017, this Court granted preliminary approval to the Parties' Settlement Agreement and ordered that the Settlement Administrator execute the approved Notice Plan. *See* 1/31/17 Order Granting Preliminary Approval (Doc. 115). The tremendous success of the Notice Plan and response from Class Members confirms that the Settlement is fair, reasonable, and provides outstanding relief to the Class.

Should the Court award Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Payment of Incentive Awards, the entire $8.25 million Settlement Fund will be exhausted. *See* 6/19/2017 Decl. of Steven Weisbrot ("Weisbrot Decl.") ¶ 16. The exhaustion of an entire claims-made settlement fund of this size is no easy feat. Plaintiffs would not have been able to negotiate a settlement fund in this amount as a true "common fund," where Defendants would have been guaranteed to forfeit $8.25 million. Instead, Plaintiffs succeeded in negotiating a "claims made" $8.25 million fund with an *outstanding notice program* – one that was clearly successful in enticing sufficient claims to exhaust the entire fund. Although the Settlement Administrator is still in the process of conducting audits to identify the total final number of timely and valid claims, Angeion estimates that it has received roughly 173,000 timely and valid Claim Form submissions. *Id.* ¶ 14. The Settlement Administrator also estimates that the notice program "delivered an approximate 87% reach" – far higher than is commonly required in low-cost consumer goods settlements. Despite the success of the notice program, to date, no objections have been filed and only two persons opted out. *Id.* ¶ 17.

Indeed, Plaintiffs predicted with almost pinpoint accuracy the amount of money needed to award all claimants their full Claim amounts *and* simultaneously exhaust the entire $8.25 million fund. As discussed below, Class Members who submitted timely and valid claims will only receive a 10 percent pro rata diminishment of their submitted claims to account for the high amount of claims and notice and claims administration expenses, such that the entire $8.25 million fund will be exhausted. *Id.* ¶ 16.[1] Thus, despite the high number of claims (and the associated higher claims administration costs), each Class Member that submitted a timely and valid claim will still receive up to $31.50 for up to 10 Subject Products without proof of purchase. As the Court previously noted, these amounts "*vastly exceed[] the potential recovery at trial based on a price premium model*." *See* 1/31/17 Order Granting Preliminary Approval at 11 (emphasis added).

The Court has already held that the "settlement amount falls within the range of approval" and approved the Notice Plan, which, as discussed below, performed 20 percent better than expected. 1/31/17 Order Granting Preliminary Approval at 12. Now that it is plain that the entire fund will be exhausted and that the Notice Plan was a success, the Court should grant final approval, certify the Settlement Class, and enter the Final Approval Order in the form submitted herewith.

II. THE STANDARD FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS

"The claims, issues, or defenses of a certified class may be settled … only with the court's approval." Fed. R. Civ. P. 23(e). The Court may finally approve a class settlement "only after a hearing and on finding that it is fair, reasonable, and

[1] The Settlement Agreement explicitly authorizes pro rata reductions based on the exhaustion of the Settlement fund *and* where Settlement Administration Expenses exceed $400,000. *See* Stipulation of Class Action Settlement, ¶¶ 46, 48 (The Settlement Agreement is attached to the 11/18/16 L. Timothy Fisher Declaration in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Doc. 103-3)).

adequate." Fed. R. Civ. P. 23(e)(2); *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). To assess whether a proposed settlement comports with Rule 23(e), a district court "may consider some or all" of the following factors: (1) the strength of plaintiff's 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 the class members to the proposed settlement. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). No single factor is the "most significant." *Officers for Justice*, 688 F.2d at 625.

In addition, "[a]dequate notice is critical to court approval of a class settlement under Rule 23(e)." *Hanlon*, 150 F.3d at 1025.

III. CLASS CERTIFICATION

The Ninth Circuit has recognized that certifying a settlement class to resolve consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. When presented with a proposed settlement, a court must first determine whether the proposed settlement class satisfies the requirements for class certification under Rule 23. In assessing those class certification requirements, a court may properly consider that there will be no trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class 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.").

In its Order Granting Preliminary Approval, the Court found that "Plaintiffs have met the requirements for class certification under Rule 23(a), in addition to Rule 23(b)(3)'s requirements that the case present questions of law and fact common

to all members of the class that predominate over individual questions, and that class treatment is the superior method of adjudication." 1/31/17 Order Granting Preliminary Approval, at 6 (Doc. 115). Notably, no objections have challenged that conclusion. The Court may rely on the same rationale as explained in its Order to find that class certification is appropriate under Fed. R. Civ. P. 23(a) and (b) in connection with final approval. *See In re Netflix Privacy Litig.*, 2013 WL 1120801, at *3 (N.D. Cal. Mar. 18, 2013) ("Because the Objections do not appear to raise a viable challenge to th[e] conclusion [that certification of a settlement class is appropriate], the Court will rely on the rationale for class certification as explained in the Preliminary Approval Order."). Here, for the same reasons set forth below and in the Order Granting Preliminary Approval, the Settlement Class meets the requirements of Rule 23(a) and (b).

A. The Requirements Of Rule 23(a) Are Met

To achieve class certification, the proposed class must meet the numerosity, commonality, typicality, and adequacy of representation requirements of Federal Rule of Civil Procedure 23(a). *See Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). In its Order Granting Preliminary Approval, the Court already concluded that Rule 23(a)'s requirements have been met. *See* 1/31/17 Order Granting Preliminary Approval at 3-5 (Doc. 115).

First, the class definition is estimated to cover millions of consumers. "Numerosity is therefore easily satisfied here." *Id*. at 3 (citing *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 449 (E.D. Cal. 2013) ("In this case, there are approximately 3,559 members in the proposed class. This number clearly meets the numerosity requirement, as joinder of over three thousand plaintiffs would be impossible.")).

Second, all of the Class Members' claims arise from a common nucleus of facts and are based on the same legal theories. Plaintiffs allege that Defendants

mislabeled the Subject Products by (1) using the term "antioxidant" on the labels when the products allegedly do not contain antioxidant nutrients, (2) labeling the products as non-alcoholic when in fact they allegedly contain two to seven times the amount of alcohol permitted for non-alcoholic beverages, and (3) allegedly understating the sugar content of the products. Further, all of the legal theories asserted by Plaintiffs are common to all Class Members. As this Court held, "the common claims and questions demonstrate ... the existence of common issues of fact and theories of law as to whether Defendants engaged in unlawful false advertising or unfair competition by mislabeling the Subject Products. Commonality is therefore satisfied." *Id*. at 4.

Third, the claims of the Class Representatives are typical of the Class' claims because "Plaintiffs' claims arise out of their purchase of Subject Products based on allegedly false or misleading labeling." *Id*. "Thus, these claims are same or similar to those of other Class Members, who are also consumers of the Subject Products and harmed by the alleged misleading labeling." *Id*. "Because Plaintiffs' claims and those of the proposed class all arise from the same alleged misleading labeling, typicality is satisfied." *Id*.

Finally, this Court has already concluded that the named Plaintiffs and their counsel satisfy the adequacy requirement:

> In this case, there is no apparent conflict of interest between Plaintiffs and the putative class members. Plaintiffs and the class members share the same complaint that Defendants misstated the alcohol, antioxidant and sugar content on the Subject Products. Plaintiffs are members of the class they seek to represent and seek a remedy for the same alleged wrongdoing under identical facts and legal theories. The Court therefore does not discern a potential for a conflict of interest.
>
> Furthermore, Plaintiffs are represented by a law firm with extensive experience in class actions suits. Specifically, Plaintiffs' attorneys have represented millions of consumers in complex class actions, product liability, and consumer fraud cases. As such, the Court is satisfied that Plaintiffs' Counsel has adequate experience to represent the class. Moreover, Plaintiffs

> and their counsel have been effectively prosecuting this action since March of 2015, engaging in extensive investigation, negotiation and mediation in order to bring the case to proposed settlement. There is no indication that they will cease these efforts throughout the settlement process. Accordingly, the adequacy requirement is satisfied.

Id. at 5 (citations omitted). Since the Court granted preliminary approval, Class Counsel has overseen an effective notice program, and it is now apparent that the entire Settlement Fund will be exhausted. Clearly, Class Counsel and the named Plaintiffs are adequate.

B. The Requirements Of Rule 23(b) Are Met

Under Rule 23(b)(3), the court must find "that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This Court has already held "that Rule 23(b)(3)'s requirements have been met," noting that Rule 23(b)(3) "is more flexible in some respects when applied to a motion for settlement-only class certification." *Id*. at 5-6. As this Court found, "the material issue in this case – whether Defendants misstated the alcohol, antioxidant and sugar contents on the labels of the Subject Products – is common to the entire class, and predominates over any individual issues which might exist. *Id*. at 6. "Furthermore, the Court [found] that a class action is the superior method for adjudicating this controversy." *See id*. "Requiring thousands of class members to litigate their claims separately would be inefficient and costly, resulting in duplicative and potentially conflicting proceedings." *Id*. "Accordingly ... the class action is the superior method for adjudicating the controversy." *Id*. "The requirements of Rule 23(b)(3) are therefore satisfied." *Id*.

IV. THE SETTLEMENT NOTICE PROGRAM HAS BEEN COMPLETED AND THE INITIAL CLASS MEMBER RESPONSE HAS BEEN POSITIVE

In its January 31, 2017 Order, after an evaluation of the Settlement's proposed Notice plan, the Court found "that the Notice complies with the requirements of Fed. R. Civ. P. 23(c)." *Id*. at 15. Accordingly, the Court ordered that the "Settlement Administrator provide Notice for the Class pursuant to the terms of the Settlement Agreement no later than February 27, 2017." *Id*. at 16 (bolding removed). Each of the Settlement's Notice provisions was implemented as set out in the Settlement and instructed by the Court. Indeed, the notice plan has been more successful than even anticipated by the settlement administrator. *See* Weisbrot Decl. at ¶¶ 6-9. To start, every Class Member for whom Defendant had contact information received direct notice via email. *See id*. ¶ 5. The internet banner notice portion of the Notice Plan ran for 8 consecutive weeks and served a total of 12,836,997 impressions, 2,436,997 more impressions than anticipated in Mr. Weisbrot's November 18, 2016 Declaration (Doc. 103-4). *See id*. ¶ 6. The social media portion of the notice program utilized Facebook to deliver a total of 2,707,658 impressions, 207,658 more than anticipated. *See id*. ¶ 7. In sum, the social media and internet banner portions of the Notice Plan, which constitute the bulk of the entire Notice Plan, were more than 20% more successful than anticipated.

To satisfy the notice requirements of the CLRA, four 1/2 page ads featuring the Summary Notice were published in the California regional edition of USA today. *Id*. ¶ 8. The ad size was increased from 1/4 page to 1/2 page to accommodate the full text of the Summary Notice. *Id*.

In addition, a link to the Settlement Website was included on Millennium's company website, Facebook, Twitter, and Instagram pages, which reach hundreds of thousands of consumers who are most likely to purchase the Subject Products. *See id*. ¶ 10. The success of the Notice Plan can also be seen though the fact that the

Settlement Website received almost a million page views. *See id.* ¶ 11. Further, the settlement toll-free hotline received 133 calls and 22 requests to have the Claim Form and/or Long Form mailed. *Id.* ¶ 12. The Settlement Administrator also received and, where appropriate, responded to over 200 emails received regarding the Settlement, mailing 58 Claim Forms and/or Long Form Notices upon request. *Id.* ¶ 13.

The Settlement Administrator estimates that the "notice program delivered an approximate 87% reach," which exceeds the already outstanding 85% reach contemplated in the Mr. Weisbrot's November 18, 2016 Declaration. *Id.* ¶ 9. The calculated 87% reach does not even account for email notice, print publication in the regional edition of USA Today, the settlement website, the toll-free hotline, and posting of a link to the Settlement Website on Millennium's website and social media platforms. *Id.* ¶¶ 9-10. The 87% reach is the hallmark of a great notice program, and certainly within the range of approval. See, e.g., *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 945–46 (9th Cir. 2015) (affirming approval of notice plan based on rental records using both regular and email); *Wilson v. Airborne, Inc.*, 2008 WL 3854963, at * 4 (C.D. Cal., Aug. 13, 2008) (approving program reaching 80% of class members); *Federal Judicial Center Judges' Class Action Notice and Claims Process Checklist*, at www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf ("A high reach, e.g. between 70-95% can often reasonably be reached by a notice campaign"); *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (notice need not actually reach every single class member; instead, the notice need only be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections).

The success of the Notice Plan is also plainly clear based on the fact that, should the Court grant Plaintiffs' Motion for Attorneys' Fees, Reimbursement of

Expenses, and Payment of Incentive Awards, the entire $8.25 million Settlement Fund will be exhausted. Although the Settlement Administrator is still in the process of conducting audits to identify the total final number of timely and valid claims, it currently estimates that it has received 173,000 timely and valid Claim Form submissions. Further, despite the fact that the banner ad portion of the Notice Plan served more than 15.5 million impressions, the Settlement Website received almost a million page views, and the consumers made numerous hotline calls and emails to the Settlement Administrator, to date, not a single person has objected to any part of the Settlement. Only two people have so far requested to be excluded.

V. THE SETTLEMENT AGREEMENT IS FAIR, ADEQUATE, AND REASONABLE

A. The Settlement Was The Product Of Serious, Informed Litigation And Non-Collusive Negotiations

As this Court noted, "[i]n general, evidence that a settlement agreement is arrived at through genuine arms' length bargaining after factual discovery supports a conclusion that the settlement is fair." 1/31/17 Order Granting Preliminary Approval at 9 (citing *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996) ("When sufficient discovery has been provided and the parties have bargained at arms' length, there is a presumption in favor of the settlement."); *Ross v. Trex Co., Inc.*, 2013 WL 6622919, at *3 (N.D. Cal. 2013); *Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856, at *4 (C.D. Cal. July 21, 2008); *see also Rodriguez v. West Publishing Corp.*, 563 F. 3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution[.]).). Here, there can be no question that the Settlement was reached through arms' length negotiations between fully informed parties.

As discussed at length in Plaintiffs' two motions for preliminary approval and this Court's Order, the Settlement "is the result of eight months of arms' length negotiations that included three sessions of formal in-person and telephonic

mediation before Jill R. Sperber, Esq. of Judicate West." *Id*. at 9. "After the first two mediation session in March and May of 2016, the parties reached their first settlement in principle and applied for preliminary approval of the settlement agreement." *Id*. After the Court denied the motion on September 21, 2016, the parties renewed their settlement negotiations to address the Court's concerns." *Id*. "On October 7, 2016, the parties participated in a third mediation with Ms. Sperber, reaching a new settlement agreement in principle." *Id*.

Further, "prior to entering into the Settlement Agreement," the parties "engaged in extensive litigation, bringing several motions to dismiss and conducting thorough discovery and investigation into the merits of the case." *Id*. "For example, the parties met and conferred frequently concerning various discovery requests, and in response, Millennium produced thousands of pages of documents, including test results and sales information." *Id*. "Plaintiffs also provided Millennium with their own test results, consumer surveys, and other materials obtained through their own research and investigation." *Id*. "Plaintiffs served subpoenas on several third parties that produced testing results and internal communications concerning Millennium's products." *Id*. "Each party, through respective counsel, conducted a thorough examination and evaluation of the relevant law, facts and allegations in order to assess the merits of Plaintiffs' case, including an investigation into the facts and law concerning (1) label design and product formulation; (2) marketing and advertising of products; (3) sales, pricing, and financial data, and (4) the sufficiency of the claims and suitability for class certification." *Id*. "[E]ach of the three mediation sessions was followed by settlement discussions during which the terms of the agreement were extensively debated and negotiated." *Id*. (quotations omitted).

As this Court held, "the fact that the Settlement Agreement was reached through arms' length negotiations after three mediation sessions with Ms. Sperber and almost two years of discovery, investigation and negotiation weighs in favor of

finding that the Settlement Agreement is a result of fair and honest negotiations." *Id.* at 10. The Court should make the same finding here again.

B. Strength Of Plaintiffs' Case

In determining the likelihood of a plaintiff's success on the merits of a class action, "the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (internal quotations omitted). The court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm. Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010) (citing *Rodriguez*, 563 F.3d at 965). Here, the settlement negotiations were hard-fought, requiring multiple mediation sessions over several months, with both Parties and their counsel thoroughly familiar with the applicable facts, legal theories, and defenses on both sides. Plaintiffs believe that the Settlement is an outstanding result considering the issues addressed below.

In false or misleading advertising cases concerning beverages or foods, plaintiffs are typically foreclosed from full-refund theories of damages at class certification. *See, e.g., In re POM Wonderful LLC*, 2014 WL 1225184, at *2-*3 (C.D. Cal. Mar. 25, 2014) (explaining that a full refund damages model is unavailable where the beverage at issue provided class members with benefits in the form of calories, hydration, vitamins, and minerals); *Red v. Kraft Foods, Inc.*, 2012 WL 8019257, at *11 (C.D. Cal. Apr.12, 2012). Here, the Subject Products contain multiple vitamins, enzymes and probiotics, and provide hydration and calories. Defendants would have strong arguments against a full damages model for relief.

Although Plaintiffs believe that proving price premium damages would be possible here, there is no guarantee that the ultimate price premium proved would justify the risk of further litigation. As to the alcohol claims, it would be difficult to

establish a price premium because Millennium's alcoholic kombucha beverages (the "Classic" line) and the purported non-alcoholic beverages (the "Enlightened" line) *retail for the exact same price at the same retail locations*. Even if Plaintiffs were to establish an alcohol labeling problem, the alcohol levels of kombucha products necessarily vary over time due to an ongoing fermentation process. Thus, the amount of alcohol in the accused products varies greatly between purchases, with some class members potentially receiving Enlightened products below and above the 0.5% alcohol by volume threshold. Further, the alcohol labeling claims would likely devolve into an uncertain "battle of the experts." Millennium produced 1,394 tests of the alcohol concentration of Enlightened kombucha beverages spanning several years within the Class Period. Every single test showed that the beverages were *below* the federally mandated 0.5% threshold set for non-alcoholic beverages.

Plaintiffs would face similar issues with their claims concerning the alleged high amounts of sugar in the Subject Products. The Subject Products contain varying amounts of sugar, and, due to the natural fermentation of the products,[2] the amount of sugar varies over time, such that Plaintiffs would have to present a viable damages theory in the face of likely evidence that some Class Members were not injured at all, while others may have been depending on the time the Subject Products remained on the shelves. Further, these inconsistencies would present issues as to commonality and predominance at class certification.

With regards to Plaintiffs' claims concerning antioxidants, Plaintiffs would face a strong hurdle at class certification and summary judgment to establish damages considering that some antioxidants (*e.g.*, catechins) are actually present in the Subject Products, just not the antioxidant "nutrients" mandated by federal and state law. *See, e.g., Khasin v. R. C. Bigelow*, 2016 WL 4504500, at *3-*6 (N.D. Cal.

[2] The bacteria in the Subject Products allegedly "eats" the sugar and converts it into alcohol.

Aug. 29, 2016) (granting summary judgment in favor of defendant in antioxidant labeling case where it was undisputed that the tea beverage contained *some* antioxidants). Nonetheless, Plaintiffs' review of the literature regarding consumer willingness to pay for labeling statements touting a product's antioxidant content shows that class members likely paid a roughly four percent premium based on the antioxidant representations at issue here. *See* Armenak Markosyan, *et al*., *Consumer Response to Information about a Functional Food Product: Apples Enriched with Antioxidants*, Canadian Journal of Agricultural Economics, 325, 337 (2009) (concluding that customers are willing to pay a 4 percent price premium for a product advertised as being enriched with antioxidants).

Defendants vigorously deny Plaintiffs' allegations and assert that neither Plaintiffs nor the Class suffered any harm or damages. In addition, Defendants would no doubt present a vigorous defense at trial, and there is no assurance that the Class would prevail – or even if they did, that they would be able to obtain an award of damages significantly higher than achieved here absent such risks. Thus, in the eyes of Class Counsel, the proposed Settlement provides the Class with an outstanding opportunity to obtain significant relief at this stage in the litigation. The Settlement also abrogates the risks that might prevent them from obtaining *any* relief.

C. The Settlement Provides Exceptional Relief For The Class

1. The Vast Majority Of Claimants Will Be Made More Than Whole For Their Damages

As discussed *supra*, it would be difficult for Plaintiffs to establish price premium damages above four percent of the purchase price. Assuming that Plaintiffs were to prevail at trial and prove damages at four percent of the $3.50 retail price, damages would be set at 14 cents per Subject Product purchased during the Class Period. Although the Settlement Administrator is still in the process of conducting audits to identify the total final number of timely and valid claims, based on the

current estimates, each Class Member that has submitted a timely and valid claim will receive roughly $3.15 in cash or vouchers[3] for each Subject Product purchased, up to $31.50 for 10 Subject Products. *See* Weisbrot Decl. ¶ 16 ("Although final claim numbers and claim administration costs are not yet final, Angeion projects that Class Members will receive a 10 percent pro rata diminishment of their submitted claims to account for the high amount of claims and expenses, such that the entire $8.25 million fund will be exhausted."). Class members can thus potentially receive full recovery for the price premium attributable to the purchase of up to 225 Subject Products within the Class Period without providing proof of purchase. Indeed, even if a class member were to make a claim for a single cash award of $3.15, that class member would recover the price premium attributable to the purchase of 22 products. The significant relief provided here clearly favors settlement approval. *See, e.g., Hendricks v. Starkist Co*., 2016 WL 5462423, at *5 (N.D. Cal. Sept. 29, 2016) ("Testing showed that there was an average underfill between 4.5% and 16.7%, resulting in damages between 3.87 cents and 14.3 cents per can. A $1.97 cash payment would provide full recovery for 13 to 50 cans and a voucher of $4.43 would provide full recovery for 30 to 114 cans. Accordingly, this factor weighs in favor of settlement as well.") (citations omitted). Indeed, as the Court previously noted, the amounts that class members can recover pursuant to the Settlement "*vastly exceeds the potential recovery at trial based on a price premium model*." *See* 1/31/17 Order Granting Preliminary Approval at 11 (emphasis added).

[3] The voucher option is valued at "100 cents on the dollar" here because class members are given a choice between choosing cash or vouchers, and because the vouchers have no expiration date, are freely transferrable, and are redeemable at any retailer that sells the Subject Products. *Hendricks v. Starkist Co*., 2016 WL 5462423, at *7, *10 n. 3 (N.D. Cal. Sept. 29, 2016) (finding that "vouchers are valued at 100 cents on the dollar" where the vouchers have no expiration date, are freely transferrable, and are redeemable at any retailer that sells the products). The Settlement Administrator estimates that about 3.2 percent of all valid and timely claims submitted were for the voucher, as opposed to the cash, option. Weisbrot Decl. ¶ 14.

2. The Settlement Is Proportionate To The Class' Overall Damages

Considering Plaintiffs' damages theories and real risks inherent in continued litigation, the total fund available to pay all claims—$8,250,000—fits squarely within the "range of possible approval." *See id*. The Settlement aims to settle all claims "from March 11, 2011 up to and including the Notice Date." Settlement ¶ 10. From March of 2011 through the end of October of 2016, Millennium sold approximately 274,715,000 bottles of the Subject Products to its distributors. Accounting for the four months between October 2016 and the end of the class period, Plaintiffs' counsel estimates that Millennium sold approximately 291 million bottles of the Subject Products to its distributors within the class period. Although the precise amount of bottles sold at retail locations during this time period is not known, it is presumably smaller than the 291 million unit figure due to unsold inventory at retail locations. However, even assuming that all 291 million bottles were sold at retail, and assuming that Plaintiffs could prevail in showing damages at 14 cents per bottle as discussed above, the total maximum recovery available at trial would be roughly $40.7 million. Thus, as the Court found in its order granting preliminary approval, the total fund made available by the Settlement represents *more than 20 percent of potential recovery at trial*. *See* 1/31/17 Order Granting Preliminary Approval at 11. This result certainly "falls well within the range of possible approval." *See id*. *See also Hendricks*, 2016 WL 5462423, at *5 ("The $12,000,000 settlement amount, while consisting only a single-digit percentage of the maximum potential exposure, is reasonable given the stage of the proceedings and the defenses asserted in this action."); *Stovall-Gusman v. W.W. Granger, Inc*., 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) (granting final approval of a net settlement amount representing 7.3 % of the plaintiffs' potential recovery at trial); *Balderas v. Massage Envy Franchising, LLC*, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (granting preliminary approval of a net settlement amount

representing 5 % of the projected maximum recovery at trial); *Ma v. Covidien Holding, Inc.*, 2914 WL 360196, at *5 (C.D. Cal. Jan. 31, 2014) (finding a settlement worth 9.1 % of the total value of the action "within the range of reasonableness"). *See also Downey Surgical Clinic, Inc. v. Optuminsight, Inc.*, 2016 WL 5938722 at *5 (C.D. Cal. May 16, 2016) (*this* Court granting final approval where recovery was as low as 3.21 % of potential recovery at trial).

Further, "claims-made settlements … are routinely approved by the Ninth Circuit and Courts in California." *See Nur v. Tatitlek Support Services, Inc.*, 2016 WL 3039573, at *3 (C.D. Cal. Apr. 25, 2016) (characterizing a string-cite of 16 cases as "only a small sample of those cases"). Here, however, there will be no reversion of any kind to Defendant should the Court grant Plaintiffs' counsel's motion for attorney's fees and costs. In other words, while styled as a "claims-made" settlement, the Settlement is more analogous to a true common fund settlement, as the entire $8.25 million fund will be exhausted. Accordingly, the Court should have no concerns about the $8.25 million figure being "illusory" based on the claims-made structure of the Settlement. Every single dollar made available by the $8.25 million fund will be distributed.

D. The Risk Of Continuing Litigation and Maintaining Class Action Status

As referenced above, proceeding in this litigation in the absence of settlement poses various risks such as failing to certify a class, having summary judgment granted against Plaintiffs, or losing at trial. Such considerations have been found to weigh heavily in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class."). Even assuming that Plaintiffs were to survive summary judgment,

they would face the risk of establishing liability at trial in light of conflicting expert testimony between their own expert witnesses and Defendants' expert witnesses. In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which expert version would be accepted by the jury. The experience of Class Counsel has taught them that these considerations can make the ultimate outcome of a trial highly uncertain. Moreover, even if Plaintiffs prevailed at trial, in light of the possible damage theories that could be presented by both sides, there is a substantial likelihood based on the above analysis that Class Members may be awarded significantly less than is offered to them under this Settlement on an individual basis. By settling, Plaintiffs and the Class avoid these risks, as well as the delays and risks of the appellate process. See 1/31/2017 Order Granting Preliminary Approval at 12 ("in particular considering the risks and expenses associated with continued litigation, the Court finds that the settlement amount falls within the range of approval").

E. The Response Of Class Members Has Been Overwhelmingly Positive

While the objection and opt-out deadlines have not yet passed (both are due on July 3), the lack of significant opposition to the settlement militates in favor of finally approving the settlement. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) (objection by only 1% of class supports approval); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (500 opt outs and 45 objections out of 90,000 class members indicates support for settlement). To date, there have been only two opt-outs and no objections. *See* Weisbrot Decl. ¶ 17. Even if a few class members end up objecting, a small number of objectors "strongly supports the fairness of the settlement" and should not stand in the way of final approval. *Shames v. Hertz Corp.*, 2012 WL 5392159, at * 8 (S.D. Cal., Nov. 5, 2012) ("The small number of objections and class members who opted out of the

settlement, when compared to the large number of class members, favors approval."). Indeed, the fact that 173,000 valid and timely claims have been submitted strongly supports that the Settlement enjoys the support of the Class.

F. The Views Of Experienced Counsel Support Approving This Settlement

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). Deference to Class Counsel's evaluation of the Settlement is appropriate because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967. Here, the Settlement was negotiated by counsel with extensive experience in consumer class action litigation. *See* Declaration of L. Timothy Fisher, Ex. 1 (firm resume of Bursor & Fisher, P.A.). Based on their experience, Class Counsel concluded that the Settlement provides exceptional results for the class while sparing the class from the uncertainties of continued and protracted litigation.

For all the foregoing reasons, the Settlement is fair, adequate, and reasonable, and should be preliminarily approved.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval to the Settlement Agreement, certify the Settlement Class, and enter the Final Approval Order in the form submitted herewith.

Dated: June 19, 2017

Respectfully submitted,

BURSOR & FISHER, P.A.

By: */s/ L. Timothy Fisher*
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