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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

RALPH MILAN and ELIZABETH ARNOLD on behalf of themselves, those similarly situated and the general public, <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> CLIF BAR & COMPANY, <p style="text-align: center;">Defendant.</p>

Case No: 18-cv-02354-JD

**PLAINTIFFS’ NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS SETTLEMENT**

Judge:	Hon. James Donato
Hearing Date:	December 14, 2023, 10:00 a.m.
Location:	Courtroom 11, 19th Floor

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1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE THAT, on December 14, 2023, at 10:00 a.m., Plaintiffs will move the
3 Court for preliminary approval of a proposed nationwide class action settlement. The Motion is based on the
4 below Memorandum; the concurrently-filed Declarations of Jack Fitzgerald (“Fitzgerald Decl.”) and
5 Brandon Schwartz (“Schwartz Decl.”), and all exhibits thereto, including the Parties’ October 31, 2023
6 Settlement Agreement (Fitzgerald Decl. Ex. 1, “SA”); all prior pleadings and proceedings, including the June
7 23, 2022 Declaration of Jack Fitzgerald in Support of Motion for Preliminary Approval (Dkt. No. 226-1, the
8 “2022 PA Mot. Fitzgerald Decl.”); and any additional evidence submitted. Plaintiffs seek an Order certifying
9 the Settlement Class, granting preliminary approval; approving the proposed Class Notice Program and
10 directing Class Notice be made; and setting schedules and procedures for effecting Class Notice, making
11 claims, opting out, objecting, and conducting a Final Approval Hearing.

12 **ISSUES TO BE DECIDED**

13 Whether the Court should certify the Settlement Class for purposes of settlement, preliminarily
14 approve the Settlement Agreement, and approve the form and content of the proposed Class Notice Program.

15 **MEMORANDUM OF POINTS & AUTHORITIES**

16 **I. INTRODUCTION**

17 After denial of preliminary approval last year, *see* Dkt. No. 232, Plaintiffs negotiated a new
18 Settlement that addresses the Court’s concerns with the prior agreement. First, by increasing the non-
19 reversionary Common Fund to \$12 million (from \$10.5 million), and limiting to four years the Class Period
20 for Settlement Class Members in states without certified classes (*i.e.*, outside of California and New York),
21 the new Settlement will put significantly more money into the hands of Claimants, which in turn is likely to
22 stimulate a higher claims rate. Second, the proposed Class Notice Program has been improved so many
23 purchasers will receive Class Notice directly. Third, the new Settlement claims process is simpler and clearer.
24 Finally, the new release is more narrowly tailored to address the Court’s concerns about its scope.¹ The Court
25 should thus find the Settlement falls within the range of reasonableness and grant preliminary approval.

26 _____
27 ¹ At that hearing, the Court noted the Procedural Guidelines had been recently updated. The information
28 required by the current guidelines is provided both in this Motion with even more specificity in the
concurrently-filed Fitzgerald Declaration. *See* Fitzgerald Decl. ¶¶ 3-108; *see also* Schwartz Decl. ¶¶ 12-34
(Notice Plan); *id.* ¶¶ 37-39 & Ex. C (proposed administrator’s security procedures).

1 **II. BACKGROUND**

2 **A. Procedural History**

3 Plaintiffs filed this action in April 2018 alleging Clif labeled its Clif Bars and Kid ZBars with health
4 and wellness claims that were misleading due to the bars' high added sugar content. *See* Dkt. No. 1, Compl.
5 In August 2019, the Court denied Clif's motions to dismiss and strike class allegations, *Milan v. Clif Bar &*
6 *Co.*, 2019 WL 3934918, at *4 (N.D. Cal. Aug. 20, 2019) (Donato, J.), after which Clif answered, Dkt. No.
7 41. Discovery and law and motion practice were extensive. *See* 2022 PA Mot. Fitzgerald Decl. ¶¶ 3-9. In
8 February 2021, Plaintiffs moved to certify classes of California and New York bar purchasers. Dkt. No. 152
9 ("Class Cert. Mot."). In September 2021, the Court certified the state classes and ordered notice be made.
10 *See Milan v. Clif Bar & Co.*, 340 F.R.D. 591 (N.D. Cal. 2021) (Donato, J.) [*"Milan II"*].

11 In May 2022, with trial looming, the Parties reached a nationwide class settlement, and on June 23,
12 2022, Plaintiffs moved for preliminary approval. Dkt. No. 226. The Court heard the motion and then denied
13 it "for the reasons stated on the record." Dkt. No. 232. The Court indicated five concerns with that agreement.

14 *First*, the Court was concerned about the implications of settling on a nationwide class basis when it
15 had only certified California and New York classes. *See* Dkt. No. 234, Tr. of Sept. 1, 2022 Hrg. at 2-3.
16 *Second*, the Court was concerned that the settlement fund was insufficient since, if there was a 100% claims
17 rate, Claimants would receive "pennies," with the Court saying it "need[s] to understand how this relatively
18 small amount of money is going to compensate an entire national group of Clif bar buyers" *Id.* at 4.
19 *Third*, the Court said that "the release . . . looks overbroad," and that it will "release strictly only what was
20 involved in the Complaint, nothing more." *Id.* *Fourth*, the Court said that the claims process "strikes me as
21 sort of a classic black box." *Id.* at 5. *Finally*, the Court was concerned about the details of the notice plan and
22 administrator's data security procedures. *See id.* at 5-6.

23 Following the hearing, the Court issued a Minute Order providing that "Plaintiffs may file a renewed
24 preliminary approval motion by October 31, 2022," and stating that if they "elect to renew their request for
25 certification of a settlement class that is nationwide in scope, plaintiffs should file an additional, separate
26 brief of up to 10 pages that addresses the propriety of a nationwide class in this context." Dkt. No. 232.

27 **B. Settlement Negotiations**

28 The Parties' initial settlement negotiations occurred over the course of a year. *See* 2022 PA Mot.

1 Fitzgerald Decl. ¶¶ 10-14. After the denial of preliminary approval, the Parties were “[un]able to reach a new
2 settlement agreement that would address the Court’s concerns” by the end of that October. Dkt. No. 236,
3 Admin. Mot. at 1. Plaintiffs thus asked the Court to re-set the pretrial conference and trial dates. *Id.* Clif
4 opposed. Dkt. No. 237, Opp. to Admin Mot. While the Parties disagreed as to whether it was proper to seek
5 an advisory opinion regarding the propriety of a nationwide settlement class without have reached a new
6 settlement, Clif filed a statement arguing in support of a nationwide settlement class. *See id.*; *see also* Dkt.
7 No. 238 (Clif’s Statement). On March 29, 2023, the Court “f[ound] that a nationwide settlement class may
8 be certified consistent with *In re Hyundai and Kia Fuel Economy Litigation*, 926 F.3d 539, 562-566 (9th Cir.
9 2019).” Dkt. No. 240. The Order directed the Parties to “confer on how they would like to proceed, whether
10 by way of a renewed class settlement or trial”; set a status conference; and administratively closed the case.
11 *Id.*

12 On June 1, 2023, the Parties advised the Court that they had attended a mediation with the Honorable
13 Andrew J. Guilford (Ret.), were working cooperatively on reaching a new settlement agreement, Dkt. No.
14 241, and requested the June 8 status conference be continued, *id.*, which the Court did, Dkt. No. 242. On July
15 12, 2023, additional counsel from Perkins Coie LLP—who were instrumental in negotiating the new
16 Settlement Agreement—appeared on behalf of Clif. Dkt. Nos. 243-44. Perkins Coie previously successfully
17 litigated a similar added sugar case brought by Class Counsel, *see Truxel v. Gen. Mills Sales, Inc.*, 2019 WL
18 3940956 (N.D. Cal. Aug. 13, 2019), and used that experience to conduct negotiations that reflected Clif’s
19 perception of its exposure in this case.

20 On August 2, 2023, the Parties advised the Court they had “reached a new settlement in principle,”
21 and were “preparing a Settlement Agreement for submission to the Court.” Dkt. No. 245, Stip. Req. to
22 Reopen Disc. at 1. They further advised the Court they had “agree[d] that obtaining contact information for
23 those class member[s] who purchased the Class Products from major retailers during the relevant period”
24 would help “maximiz[e] both the reach of class notice and the claims rate[.]” *Id.* Accordingly, the Parties
25 “request[ed] the Court find good cause to reopen discovery for the limited purpose of allowing Plaintiffs to
26 serve subpoenas on Walmart, Target, Kroger, and Amazon.” *Id.* at 2 (citations omitted). On August 8, 2023,
27 the Court “deferred [the request] pending the Court’s review of a revised application for preliminary
28 approval.” Dkt. No. 246.

1 **III. THE SETTLEMENT**

2 **A. The Settlement Class**

3 The Settlement Class is comprised of all persons who, during the Class Period, purchased in the
 4 United States, for household use and not for resale or distribution, one of the Class Products, SA ¶ 2.7,²
 5 meaning (i) Clif Bars in packaging bearing the phrase “Nutrition for Sustained Energy”; and (ii) Clif Kid
 6 ZBars in packaging bearing a Challenged Claim (as identified in the Complaint). *Id.* ¶ 2.14. “Class Period”
 7 means (i) for Class Members in California and New York, April 19, 2014 to March 31, 2023; and (ii) for
 8 Class Members outside of California and New York, March 31, 2019 to March 31, 2023. *Id.* ¶ 2.13.

9 Although the original Complaint pleaded, as an alternative, a nationwide class under California law,
 10 *see* Compl. ¶¶ 208, 218-58, Plaintiffs ultimately sought and obtained certification of classes of California
 11 and New York Clif Bar and Kid Z Bar purchasers, under California and New York law. *See* Class Cert. Mot.
 12 at 1; *Milan II*, 340 F.R.D. at 596, 602. As a result, members of these Certified Classes have live claims for
 13 purchases dating back to April 2014. But consumers who are not members of these California and New York
 14 Classes no longer have viable claims for their purchases that pre-date the relevant statutory period, whether
 15 under California law or that of another state’s. *Cf.* Dkt. No. 234, Tr. of Sept. 1, 2022 Hrg. at 3 (The Court
 16 observing that “[n]o consumer in these other states would have expected” a nationwide settlement “after my
 17 certification order.”). Since consumers outside of California and New York do not have viable claims for
 18 purchases predating the relevant statutory period, it would represent a windfall to reimburse those purchases
 19 from the proposed Settlement Fund while diluting the amount available for consumers with viable claims.
 20 *See* Fitzgerald Decl. ¶¶ 3-7 (explaining the differences between the Settlement Class and Certified Classes).

21 It was thus remiss of the Parties to have included these extinguished claims in the previous proposed
 22 settlement. Excluding them here makes the new Settlement significantly stronger for the Settlement Class.
 23 Plaintiffs’ economic expert, Colin Weir, performed an analysis of the sales data to determine the proportion
 24 of sales that would no longer be included in the Settlement compared to the previous settlement, which
 25 covered a full, 9-year class period for all U.S. consumers. *Id.* ¶ 8. Based on that analysis, the Settlement Class

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 27
 28 ² Excluded from the Settlement Class are: (a) Clif Bar’s board members or executive-level officers including
 its attorneys; (b) governmental entities; (c) the Court, the Court’s immediate family, and the Court’s staff;
 and (d) any person who timely and properly excludes themselves. *Id.*

1 is now estimated to be 7.4 million, compared to 15.7 million previously. *Id.* Given that the present Settlement
 2 Class is significantly smaller in size and the Settlement provides an extra \$1.5 million compared to the
 3 previous one, the Settlement now provides significantly more relief to Class Members.

4 **B. Benefits of the Settlement**

5 **1. Clif Will Establish a \$12,000,000 Non-Reversionary Settlement Fund**

6 For Class Members' releases, Clif will establish a \$12 million non-reversionary common fund (the
 7 "Common Fund" or "Settlement Fund") to pay Notice and Claim Administration Expenses; Court-approved
 8 attorneys' fees, expenses, and service awards; and Class Member Claims. SA ¶¶ 2.16, 4.1.

9 **a. Class Member Claims**

10 Class Members who make valid, timely Claims will be entitled to a Cash Payment. *Id.* ¶ 4.7; *see also*
 11 *id.* ¶ 5 (describing claims process in detail). Class Members, whether or not they provide Proof of Purchase,
 12 may receive \$5 if they purchased up to 30 bars; \$10 if they purchased between 31 and 60 bars; and \$15 if
 13 they purchased more than 60 bars. *Id.* ¶ 4.8(a). Class Members who provide Proof of Purchase for more than
 14 60 bar purchases may receive \$15 for the first 60 bars, plus twenty-five cents (\$0.25) for each additional bar,
 15 up to a maximum recovery of fifty dollars (\$50) (*i.e.*, if there is proof of purchase for 75 bars, that Claimant
 16 may receive $\$15 + 15 \times \$0.25 = \$18.75$). *Id.* ¶ 4.8(b). These amounts are subject to a *pro rata* increase or
 17 decrease if the value of all approved Claims either exceeds or falls short of the amount available to Class
 18 Members. *Id.* ¶ 4.9. Any amounts remaining uncleared after 120 days will either be provided to Class
 19 Member Claimants in a supplemental distribution if economically feasible, or donated *cy pres* in equal shares
 20 to the Resnick Center for Food Law and Policy at the University of California, Los Angeles School of Law;
 21 and the Tufts University Friedman School of Nutrition Science & Policy, if accepted by the Court. *See id.* ¶¶
 22 2.19, 4.11; *see also* Fitzgerald Decl. ¶¶ 96-97 (describing proposed *cy pres* recipients).

23 **b. Notice and Other Administrative Costs**

24 The Settlement Fund will be used to pay the actual costs of Class Notice and other administrative
 25 costs. SA ¶ 4.1. After soliciting bids from several administrators, the Parties have agreed, with the Court's
 26 approval, to retain Postlethwaite & Netterville, APAC ("P&N") as the Settlement Administrator. *See*
 27 Fitzgerald Decl. ¶¶ 59-68 (detailing process of selecting Class Administrator). P&N has been administering
 28 class action notice and claims since 1999 and is experienced in state and federal courts. Schwartz Decl. ¶¶

3-5 & Exs. A-B. P&N was also the Settlement Administrator for similar settlements reached in *Hadley*, *Krommenhock*, *McMorrow*, *Hanson*, and *Andrade-Heymsfield*, all cases similar to this one. *See* Fitzgerald Decl. ¶ 67. P&N estimates the cost of Class Notice will be \$337,491; and the cost of administration will be \$183,129, based on an estimated 3.0% claims rate (or 222,000 claims based on 7.4 million Class Members), *see id.* ¶¶ 70-72; *see also* Schwartz Decl. ¶¶ 8-11. The Settlement provides that Class Notice will be effectuated through a Class Notice Program designed by the Settlement Administrator to comply with the requirements of Rule 23 and approved by the Court. *See* SA ¶ 6.1.2; *see also id.* ¶ 6.2. P&N has proposed a Class Notice Program that meets these requirements. *See* Schwartz Decl. ¶¶ 12-35, 40-41; *see also infra* Point V(C). On behalf of Clif, P&N will also serve CAFA notice upon the appropriate officials within 10 days after the filing of this Motion, as required by 28 U.S.C. § 1715(b). *See* SA ¶ 6.2.5. In addition, the Parties have agreed, with the Court’s permission, to subpoena the four top retailers of the Class Products (Wal-Mart, Target, Kroger, and Amazon) for information allowing Direct Notice to as many Class Members as possible. *See* Dkt. No. 245, Stip. Req. to Reopen Disc.; *see also* Dkt. No. 247 at 2-3. The Parties “agree that obtaining contact information for those class members who purchased the Class Products from [these] major retailers during the relevant period . . . will aid the Parties in maximizing both the reach of class notice and the claims rate[.]” Stip. Req. to Reopen Disc. at 1. The Parties have already advised the retailers of the likelihood of the forthcoming subpoenas, and will ensure that Class Member contact information is transmitted directly to the Settlement Administrator and adequately protected. Fitzgerald Decl. ¶ 73.

c. Attorneys’ Fees, Costs, and Class Representative Service Awards

At least 35 days before the Objection Date, Plaintiffs and Class Counsel will request that the Court award attorneys’ fees and costs and Service Awards from the Settlement Fund. *See* SA ¶¶ 4.13.1, 9.1, 9.2. Clif has the right to oppose the requests. *Id.* ¶ 9.3. “The Court’s determination of the Fee Award and Service Awards will not affect the remainder of the Settlement.” *Id.* ¶ 9.4.³

³ The Settlement includes a “quick pay” provision for the Fee Award. *Id.* ¶ 4.13.2. These provisions help deter meritless objections and are routinely approved in this District. *See In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2020 WL 4212811, at *40 (N.D. Cal. July 22, 2020) (“[Q]uick-pay provisions have long been accepted in the appropriate circumstances.” (citing *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *1 (N.D. Cal. Dec. 27, 2011) (“With respect [to] the ‘quick pay’ provisions, Federal courts, including this Court and others in this District, routinely approve settlements that provide for payment of

1 **2. Clif Will Make Meaningful Labeling Changes**

2 The Settlement obligates Clif to revise the original Clif Bars’ and Clif Kid ZBars’ labeling, “including
3 both the outer box packaging and individual bar wrapper,” and maintain those changes “for a period of at
4 least 24 months,” “so long as 10% or more of [a bar’s] calories come from added sugars.” *Id.* ¶ 4.6.
5 Specifically, Clif “will not use the word ‘Nutrition’ (including ‘Nutritious’)” on original Clif Bars, and “will
6 not use the word ‘Nutritious,’” or the phrase “Nourishing Kids in Motion” on Clif Kid ZBars. *See id.* ¶ 4.6.1.

7 **C. The Release**

8 Settlement Class Members who have not opted out will “have released, waived, and forfeited and
9 shall be permanently barred and enjoined from initiating, asserting, and/or prosecuting any Released Claim
10 against any Released Party in any court or any forum.” *Id.* ¶ 8.1. The “Released Claims” are, “with the
11 exception of claims for personal injury, any and all claims or causes of action . . . that were or could have
12 been asserted in the Action, which arise from Plaintiffs’ allegations that Clif Bar’s labeling, packaging,
13 marketing and/or advertising of the Class Products was misleading or deceptive due to the added sugar
14 content of the Class Products.” *Id.* ¶ 2.39. The Settlement Agreement thus expressly makes clear “Class
15 Members are releasing claims based only on the identical factual predicate set forth in the Complaint and
16 nothing further.” *Id.*; *cf. Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010).

17 **D. Opting Out**

18 Class Members who wish to opt out must submit a Request for Exclusion to the Settlement
19 Administrator, postmarked or submitted via the Settlement Website no later than the Opt-Out Date. SA ¶
20 7.1.1. “Mass” or “class” opt-outs are not permitted. *Id.* Class Members who submit a timely, valid Request
21 for Exclusion will not be bound by the terms of the Settlement, whereas all other Class Members will be
22 bound by the Settlement and any Final Judgment. *Id.* ¶¶ 7.1.2, 7.1.3.

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25 _____
26 attorneys’ fees prior to final disposition in complex class actions.” (collecting cases)); *see also*
27 *Krommenhock v. Post Foods, LLC*, 2021 WL 2910205, at *2 (N.D. Cal. June 25, 2021) (approving quick
28 pay of attorneys’ fees and costs); *Hadley v. Kellogg Sales Co.*, 2021 WL 5706967, at *2 (N.D. Cal. Nov. 23,
2021) (same); *Hanson v. Welch Foods Inc.*, 2022 WL 1133028, at *2 (N.D. Cal. Apr. 15, 2022) (same); *cf.*
Pelzer v. Vassalle, 655 Fed. App’x 352, 365 (6th Cir. 2016) (“over one-third of federal class action settlement
agreements in 2006 included quick-pay provisions” and they do “not harm the class members in any
discernible way . . .” (citation omitted)).

1 **E. Objecting**

2 Settlement Class Members wishing to object must, by the Objection Date, file their written objections
3 with the Court. *Id.* ¶ 7.2.1; *see also* N.D. Cal. Procedural Guidelines, Preliminary Approval ¶ 5. An objection
4 must contain (a) a heading which refers to the Action; (b) the objector’s name, address, telephone number
5 and if represented by counsel, the name, address, and telephone number of his/her counsel; (c) a statement
6 under oath that the objector is a Class Member; (d) a statement of the objection and the specific grounds
7 supporting the objection; (e) a statement whether the objection applies only to the objector, to a specific
8 subset of the Class, or to the entire Class; (f) copies of any papers, briefs, or other documents upon which the
9 objection is based; and (g) the objector’s handwritten, dated signature. SA ¶ 7.2.1. The Parties have the right,
10 but not the obligation to respond to any objections. *Id.* ¶ 7.2.2.

11 **IV. TIMELINE**

12 The following timeline, which appears in the proposed Preliminary Approval Order incorporated into
13 the Settlement Agreement, permits adequate time for all necessary steps through final approval.

Event	Day	Approx. Weeks After Preliminary Approval	Example Assuming PA Granted 12/14/23
Date Court grants preliminary approval	0	-	December 14, 2023
Deadline to serve retailer subpoenas (on Walmart, Target, Kroger and Amazon)	7	1 week	December 21, 2023
Deadline to commence 60-day Class Notice period	21	3 weeks	January 4, 2024
Deadline for Plaintiffs to file Motion for Attorneys’ Fees, Costs, and Service Awards	46	6.5 weeks	January 29, 2024
Notice completion date, and deadline to make a claim, opt out, and object	81	11.5 weeks	March 4, 2024
Deadline for Plaintiffs to file Motion for Final Approval	99	14 weeks	March 22, 2024
Final Approval hearing	113	16 weeks	April 5, 2024

25 **V. ARGUMENT**

26 **A. The Court Should Certify the Nationwide Settlement Class**

27 The Court previously found the Rule 23(a) and 23(b)(3) elements met on behalf of classes of
28 California and New York consumers of Clif Original and Kid ZBars. *See Milan II*, 340 F.R.D. at 597-602.

1 The Settlement Class differs in that it is a single, nationwide class, *see* Fitzgerald Decl. ¶¶ 3-5, but the Ninth
 2 Circuit has made clear that in the settlement context, predominance is satisfied because California law may
 3 be applied to a nationwide settlement class. *See In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539,
 4 561-66 (9th Cir. 2019) (en banc); *accord* Dkt. No. 240 (“The Court finds that a nationwide settlement class
 5 may be certified consistent with *In re Hyundai . . .*”).

6 **B. The Court Should Approve the Proposed Settlement**

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

10 *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2019 WL 387322, at *4 (N.D. Cal. Jan. 30, 2019)
 11 [“*Yahoo! I*”] (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citing
 12 Manual for Complex Litigation (Second) § 30.44)). “The proposed settlement need not be ideal, but it must
 13 be fair and free of collusion, consistent with a plaintiff’s fiduciary obligations to the class.” *Walsh v.*
 14 *CorePower Yoga LLC*, 2017 WL 589199, at *6 (N.D. Cal. Feb. 14, 2017) (citing *Hanlon v. Chrysler Corp.*,
 15 150 F.3d 1011, 1027 (9th Cir. 1998)).

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

17 The initial proposed settlement was reached after discovery closed, the Court issued class certification
 18 and summary judgment orders, and a few months before trial. It took the Parties two private mediations and
 19 a settlement conference with Judge Spero to reach that accord. After the Court denied preliminary approval,
 20 it took the Parties another year, including another mediation before Judge Guilford and numerous additional
 21 conferences between the Parties’ counsel, including two lengthy in-person meetings in San Diego, before the
 22 Parties reached this new Settlement Agreement. Moreover, this is now the sixth settlement Class Counsel
 23 has reached with food manufacturers based on similar claims, such that counsel has a deep understanding of
 24 their value and risks. Fitzgerald Decl. ¶¶ 36-40. The Court should therefore find the Settlement is the product
 25 of serious, informed, non-collusive negotiations. *See, e.g., Huntsman v. Sw. Airlines, Co.*, 2018 WL
 26 11371114, at *2 (N.D. Cal. Dec. 5, 2018) (Donato, J.) (“The assistance of an experienced mediator in the
 27 settlement process supports the finding that the Settlement is non-collusive.”); *cf. Campbell v. Facebook,*
 28 *Inc.*, 951 F.3d 1106, 1121-22 (9th Cir. 2020) (“case does not implicate the ‘higher standard of fairness’ that

1 applies . . . before the district court has formally certified a litigation class,” because settlement was
2 ““negotiated by a court-designated class representative”” (quotation omitted)).

3 There are also none of the “subtle signs” of collusion that the Ninth Circuit identified in *In re*
4 *Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). Nothing purports to entitle
5 counsel to “a disproportionate distribution of the settlement” (and Class Members are to “receive[] [a]
6 monetary distribution”); nothing returns unawarded fees to Clif; and the Settlement includes no “clear
7 sailing” agreement, instead providing only that counsel will apply to the Court for fees, imposing no
8 conditions on Clif’s response, and making the Fee Award and Service Award determinations independent of
9 the Settlement’s other provisions. *See id.*; *see also* SA ¶¶ 9.1, 9.4. The parties have not negotiated fees in any
10 way, and Clif has and will have no input on the amount of the fee request. “[T]he prospect of fraud or
11 collusion is substantially lessened where, as here, the settlement agreement leaves the determination and
12 allocation of attorney fees to the sole discretion of the trial court.” *In re Chinese-Manufactured Drywall*
13 *Prod. Liab. Litig.*, 424 F. Supp. 3d 456, 486 (E.D. La. 2020).⁴

14 2. The Settlement Does Not Grant Preferential Treatment Improperly

15 The Settlement does not treat the Class Representatives or any Class Members preferentially, since
16 every Class Member who makes a claim, including the Class Representatives, will be subject to the same
17 claims process that provides the same remedy based on the Claimant’s purchase history. That Plaintiffs will
18 move for service awards, based on their efforts in prosecuting this matter, *see* Fitzgerald Decl. ¶¶ 94-95, does
19 not change this. *See Harris v. Vector Mktg. Corp.*, 2011 WL 1627973, at *9 (N.D. Cal. Apr. 29, 2011) (“[T]he
20 Ninth Circuit has recognized that service awards to named plaintiffs in a class action are permissible and do
21 not render a settlement unfair or unreasonable.” (citing *Stanton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir.
22 2003); *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958-69 (9th Cir. 2009))).

23 3. The Settlement Falls Within the Range of Possible Approval

24 “To evaluate the range of possible approval criterion, which focuses on substantive fairness and
25 adequacy, courts primarily consider plaintiffs’ expected recovery balanced against the value of the settlement

26
27 ⁴ Similarly, no other agreements have been made in connection with the proposal, Fitzgerald Decl. ¶ 2, so
28 there is no possibility such an agreement “may have influenced the terms of the settlement by trading away
possible advantages for the class in return for advantages for others.” Fed. R. Civ. P. 23(e), advisory
committee note (2003 amendment).

offer.” *Id.* (quoting *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009) (citation omitted)).

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

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

a. The Churchill Village Factors Favor Preliminary Approval

The Strength of Plaintiffs’ Case and the Risk, Expense, Complexity, and Duration of Further Litigation. Plaintiffs and their counsel believe this case was strong on the merits, and the Settlement reflects that. But the case was by no means perfect or without risk. Clif vigorously challenged nearly every aspect of Plaintiffs’ claims and supported its position with expert and other evidence. 2022 PA Mot. Fitzgerald Decl. ¶ 19. This included issues like interpretation, materiality, healthfulness of the bars, and damages. *Id.* If the jury found any of these arguments compelling, it could break the chain of causality Plaintiffs needed to establish to prove Clif’s false advertising liability. *Id.* Moreover, in preparing for trial, Class Counsel observed in focus groups a certain amount of attitudinal resistance to Plaintiffs’ claims, which sometimes manifested as a reluctance to award any substantial damages, *see id.* ¶ 20. Thus, there was a risk the Certified Classes could lose at trial and recover nothing. Even if Plaintiffs were successful at trial, numerous appeal issues remained, presenting both inherent risk and substantial delay. *Id.* ¶ 21. These factors thus weigh in favor of preliminary approval. *See also* Fitzgerald Decl. ¶¶ 18-34 (discussing case strengths and risks).

The Risk of Maintaining Class Action Status Through Trial. “An order that grants or denies class certification may be altered or amended before final judgment.” Fed. R. Civ. P. 23(c)(1)(C). As the Court has noted, this means, “‘if future decisions or circumstances’ warrant, the ‘district court can decertify the class.’” *In re Capacitors Antitrust Litig.*, 2020 WL 870927, at *3 (N.D. Cal. Feb. 21, 2020) (Donato, J.) (quoting *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1276 (9th Cir. 2019)); *see also DZ Reserve v. Meta Platforms*, 2022 WL 912890, at *8-9 (N.D. Cal. Mar. 29, 2022) (Donato, J.) (Admitting testimony of damages expert who performed conjoint analysis but noting that “[i]f evidence emerges at trial that

1 substantially impeaches Dr. Allenby’s methods and conclusions, the door may be opened to consideration of
 2 decertification.”). Because the risk of decertification due to changed law or circumstances is ever-present,
 3 this factor favors approval. *See In re Facebook Biometric Info. Privacy Litig.*, 522 F. Supp. 3d 617, 628 (N.D.
 4 Cal. 2021) (Donato, J.) [*In re Facebook*] (finding factor supported final approval).

5 ***The Settlement Amount.*** The \$12 million Settlement Fund is substantial, and fair when compared to
 6 the potential recovery at trial, and to other settlements, including in similar cases challenging health and
 7 wellness claims on high-sugar foods. *See* Fitzgerald Decl. ¶¶ 15-39, 103-107; *infra* Point V(B)(3)(b).

8 ***The Extent of Discovery Completed and Procedural Posture.*** The investigation and discovery here
 9 permit the Parties and Court to make an informed analysis. *See* 2022 PA Mot. Fitzgerald Decl. ¶¶ 3-8. This
 10 is especially true given the earlier (or concurrent) prosecution of cases based on the same theory and similar
 11 evidence, like *Hadley*, *Krommenhock*, *McMorrow*, *Hanson*, and *Andrade-Heymsfield*. *See* Fitzgerald Decl.
 12 ¶¶ 36-39. “The case was on the cusp of trial and so was fully developed, and counsel on both sides had a
 13 mature understanding of the issues and risks on both sides.” *See In re Facebook*, 522 F. Supp. at 628; *cf.*
 14 2022 PA Mot. Fitzgerald Decl. ¶ 20 (detailing trial preparations).

15 ***The Experience and Views of Counsel.*** “[P]arties represented by competent counsel are better
 16 positioned than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation.”
 17 *Rodriguez*, 563 F.3d at 967 (quotation omitted). In evaluating a settlement, “[t]he opinions of counsel should
 18 be given considerable weight both because of counsel’s familiarity with th[e] litigation and previous
 19 experience with cases.” *Larsen v. Trader Joe’s Co.*, 2014 WL 3404531, at *5 (N.D. Cal. July 11, 2014). Here,
 20 Class Counsel has considerable experience prosecuting consumer class actions, particularly those involving
 21 the false advertising of foods. Since 2016, Class Counsel has been prosecuting a series of similar cases
 22 involving high-sugar cereals, bars, and beverages, and thus has been exposed to a wide variety of information
 23 about the claims and defenses, so that counsel has an especially good appreciation of the value and risks of
 24 the case. Fitzgerald Decl. ¶¶ 36-38. Counsel strongly endorses the Settlement. *Id.* ¶ 43. Accordingly, this
 25 factor favors preliminary approval. *See Larsen*, 2014 WL 3404531, at *5. Moreover, defense counsel from
 26 both firms have significant experience and success in defending consumer class actions, assuring arms’
 27 length and informed negotiations.

28 ***Governmental Participation.*** There is no governmental participant, so this factor is inapplicable. *See*,

1 e.g., *In re Yahoo Mail Litig.*, 2016 WL 4474612, at *7 (N.D. Cal. Aug. 25, 2016).

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

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

6 Here, Plaintiffs and Class Counsel secured for the Settlement Class direct monetary benefits of \$12
7 million, which is reasonable in relation to the risk and potential trial damages for the Certified Classes. *See*
8 *Fitzgerald Decl.* ¶¶ 14-43. Further, the Settlement provides relief to Settlement Class Members outside of
9 California and New York, who otherwise be left uncompensated. For even the possibility of obtaining the
10 nationwide relief conferred by the Settlement, Class Counsel or other attorneys would have to file and
11 prosecute actions in all other states since, given the existing legal precedents, it is virtually impossible that
12 the claims of the nationwide Settlement Class could ever be adjudicated in a single forum and trial. Such
13 litigation would cost the respective state classes millions of dollars to prosecute, be inherently risky, and
14 continue for years, not including any appeals. *See id.* ¶ 42. Such litigation would be particularly risky because,
15 as part of the earlier settlement, Clif implemented the label changes mandated by this current agreement, and
16 those new labels make any potential challenges even more difficult. This confirms the “reasonableness of
17 the Settlement,” since “[d]istrict courts have approved settlements as being in good faith for payment of 3%
18 of an alleged tortfeasor’s potential liability.” *Heim v. Heim*, 2014 WL 1340063, at *5, *6 (N.D. Cal. Apr. 2,
19 2014) (citing *Chevron Env’tl. Mgmt. Co. v. BKK Corp.*, 2013 WL 5587363, at *3 n.2 (E.D. Cal. Oct. 10,
20 2013) (approving settlement representing less than 3% of total clean-up costs)); *cf. In re Mego Fin. Corp.*
21 *Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000), *as amended* (June 19, 2000) (“It is well-settled law that a cash
22 settlement amounting to only a fraction of the potential recovery does not per se render the settlement
23 inadequate or unfair.” (quotation omitted)); *see also McCabe v. Six Continents Hotels, Inc.*, 2015 WL
24 3990915, at *10 (N.D. Cal. June 30, 2015) (approving settlement representing between 0.3% and 2% of
25 potential recovery). Moreover, the Settlement is reasonable compared to the settlements approved in the
26 similar class actions based on potential price premium damages. *Fitzgerald Decl.* ¶¶ 103-108.

27 **c. The Settlement’s Injunctive Relief is Appropriate and Meaningful**

28 The Settlement also secures injunctive relief that directly addresses Plaintiffs’ allegations that the

bars are misleadingly labeled to suggest they are healthy or nutritious. *See* Fitzgerald Decl. ¶¶ 10-13. “[T]here is a high value to the injunctive relief obtained” in consumer class actions resulting in labeling changes. *See Bruno v. Quten Research Inst., LLC*, 2013 WL 990495, at *4 (C.D. Cal. Mar. 13, 2013). This benefits not just Class Members, but also “the marketplace, and competitors who do not mislabel their products.” *Id.* ¶ 11. Moreover, in *Hadley*, the Honorable Lucy H. Koh found that similar “injunctive relief”—the cessation or revision of health and wellness claims on sugary cereals—“provides health benefits to all purchasers of Defendant’s products.” *Hadley*, 2021 WL 5706967, at *2. And the FDA recently concluded that limiting manufacturers’ use of “healthy” claims on sugary foods would result in healthcare savings of up to \$700 million over 20 years. *See* 87 Fed. Reg. 5063, 5064 (Jan. 31, 2022) (“Updating the definition of ‘healthy’ to align with current dietary recommendations can help consumers build more healthful diets to help reduce their risk of diet-related chronic diseases. Discounted at seven percent over 20 years, the mean present value of benefits of the proposed rule is \$260 million, with a lower bound estimate of \$17 million and an upper bound estimate of \$700 million.”). Further, Clif has represented to Class Counsel that the labeling and marketing changes have cost it at least \$474,000 to date. Fitzgerald Decl. ¶ 10.

d. The Court will be Empowered to Determine Reasonable Awards

Here, Class Counsel anticipates petitioning the Court for a Fee Award of up to one-third of the common fund, or \$4 million. As of October 15, 2023, Class Counsel has expended over 10,662 hours on the litigation for a total lodestar of about \$7.08 million. Fitzgerald Decl. ¶¶ 77-92. A one-third fee, if awarded, would thus represent a *negative* multiplier of 0.56 to counsel’s lodestar, demonstrating its reasonableness. *Id.* ¶ 92. Moreover, in support of the fee application, counsel will show, *inter alia*, that the following factors support the request: the excellent benefits obtained for the Class; the quality of representation; the complexity and novelty of the issues presented; and the contingent nature of the representation and risk of nonpayment.

In addition, “[a]ttorneys who create a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class.” *Vincent v. Reser*, 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013) (citations omitted); *see also* Fed. R. Civ. P. 23(h). Here, Class Counsel anticipates seeking reimbursement for expenses of \$917,584. *See* Fitzgerald Decl. ¶ 93. Finally, Class Representatives Ralph Milan and Elizabeth Arnold will petition the Court for Service Awards of \$5,000 each. *See id.* ¶¶ 94-95; *Norcia v. Samsung Telecomms. Am., LLC*, 2021 WL 3053018, at *5 (N.D. Cal. July 20, 2021) (Donato, J.)

1 (“Incentive awards are fairly typical in class action cases.” (quoting *Rodriguez*, 563 F.3d at 958)). In support,
 2 Plaintiffs will evidence, *inter alia*, “the amount of time and effort that [they] have expended in pursuing the
 3 litigation,” *see Vasquez v. USM Inc.*, 2016 WL 612906, at *4 (N.D. Cal. Feb. 16, 2016) (Donato, J.).

4 **4. The Settlement has No Obvious Deficiencies**

5 Given the monetary and injunctive benefits of the Settlement, there are no obvious deficiencies.

6 **C. The Court Should Approve the Class Notice and Class Notice Program**

7 “Due process requires adequate notice before the claims of absent class members are released.”
 8 *Yahoo! I*, 2019 WL 387322, at *5 (citing *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th
 9 Cir. 2015)). “Rule 23 requires only the ‘best notice that is practicable under the circumstances, including
 10 individual notice to all members who can be identified through reasonable effort.’” *Briseno v. ConAgra*
 11 *Foods, Inc.*, 844 F.3d 1121, 1128-29 (9th Cir. 2017) (emphasis omitted) (quoting Fed. R. Civ. P. 23(c)(2)(B)).
 12 P&N’s proposed Class Notice Program is reasonable under the circumstances, as it is designed to reach a
 13 superlative 80% of Class Members, at least 2.5 times each. *See* Schwartz Decl. ¶¶ 12-16, 40; *see also*
 14 *Edwards v. Nat’l Milk Producers Fed’n*, 2017 WL 3623734, at *4 (N.D. Cal. June 26, 2017), *aff’d sub nom.*
 15 *Edwards v. Andrews*, 846 F. App’x 538 (9th Cir. 2021) (“[N]otice plans estimated to reach a minimum of 70
 16 percent are constitutional and comply with Rule 23.”).

17 The proposed Class Notice itself is also appropriate, since it contains “information that a reasonable
 18 person would consider to be material in making an informed, intelligent decision of whether to opt out”
 19 *See In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977). The Notice sufficiently
 20 informs Class Members of (i) the nature of the litigation, the Settlement Class, and the identity of Class
 21 Counsel, (ii) the essential terms of the Settlement, including the gross settlement award and net settlement
 22 payments Class Members can expect to receive, (iii) how notice and administration costs, court-approved
 23 attorneys’ fees, costs, and Service Awards will be paid from the Settlement Fund, (iv) how to make a Claim,
 24 opt out, or object, (v) procedures and schedules relating to final approval, and (vi) how to obtain further
 25 information. *See* SA Ex. 1, Long Form Notice. The Notice also satisfies the requirements to advise Class
 26 Members of the Settlement Website, and instructions on how to access the case docket. *See id.*

27 **VI. CONCLUSION**

28 The Court should grant the Motion.

1 Dated: October 31, 2023

Respectfully Submitted,

2 /s/ Jack Fitzgerald

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