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

| | |
|---|---|
| STEPHEN HADLEY, MELODY DIGREGORIO, ERIC FISHON, KERRY AUSTIN, and NAFEESHA MADYUN, on behalf of themselves, all others similarly situated, and the general public,<br><br>Plaintiffs,<br><br>v.<br><br>KELLOGG SALES COMPANY,<br><br>Defendant. | Case No. 5:16-cv-04955-LHK<br><br>**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL**<br><br>[Fed. R. Civ. P. 23(e)]<br><br>Judge: Hon. Lucy H. Koh<br>Date: May 20, 2021<br>Time: 1:30 p.m.<br>Location: Courtroom 8 – 4th Floor |

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14
15
16
17
18
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21
22
23
24
25
26
27
28

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

NOTICE OF MOTION ..... 1

ISSUES TO BE DECIDED ..... 1

MEMORANDUM OF POINTS & AUTHORITIES ..... 1

I. INTRODUCTION ..... 1

II. PROCEDURAL HISTORY ..... 2

III. THE SETTLMENT ..... 3

A. The Settlement Class ..... 3

B. Benefits for the Settlement Class ..... 4

1. Kellogg will Establish a $13 Million Non-Reversionary Settlement Fund ..... 4

2. Kellogg Will Make Substantial Labeling Commitments ..... 5

C. Class Notice and Claims Administration ..... 6

D. The Settlement's Release ..... 6

E. Opting Out ..... 7

F. Objecting ..... 7

G. Attorneys' Fees, Costs, and Service Awards ..... 7

H. Timeline ..... 8

IV. ARGUMENT ..... 9

A. The Court Should Certify the Settlement Class ..... 9

1. The Requirements of Rule 23(a) are Satisfied ..... 9

a. Numerosity ..... 9

b. Commonality ..... 9

c. Typicality ..... 10

d. Adequacy ..... 10

2. The Requirements of Rule 23(b)(3) are Satisfied ..... 11

a. Predominance ..... 11

b. Superiority ..... 14

B. The Court Should Approve the Proposed Settlement ..... 14

1. The Settlement is the Product of Serious, Informed, Non-Collusive Negotiations ..... 15

2. The Settlement Does Not Grant Preferential Treatment Improperly ..... 17

3. The Settlement Falls within the Range of Possible Approval ..... 17

a. The *Churchill Village* Factors Favor Preliminary Approval ..... 17

b. The Monetary Relief is Fair in Relation to Potential Damages ..... 22

c. The Injunctive Relief is Appropriate and Meaningful ..... 23

d. The Court will Determine Reasonable Fees, Costs, and Service Awards ..... 23

4. The Settlement has No Obvious Deficiencies ..... 24

C. The Court Should Approve the Class Notice and Notice Plan ..... 25

V. CONCLUSION ..... 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

## TABLE OF AUTHORITIES

**Cases**

*Allen v. Hyland's, Inc.*,
No. 12-cv-1150 DMG (MANx) (C.D. Cal.) ... 17

*Amchem Prods., Inc. v. Windsor*,
521 U.S. 591 (1997) ... 11, 12

*Bradach v. Pharmavite, LLC*,
735 Fed. Appx. 251 (9th Cir. 2018) ... 12

*Briseno v. ConAgra Foods, Inc.*,
844 F.3d 1121 (9th Cir. 2017) ... 25

*Broomfield v. Craft Brew Alliance, Inc.*,
2020 WL 1972505 (N.D. Cal. Feb. 5, 2020) ... 13

*Bruno v. Quten Research Inst., LLC*,
2013 WL 990495 (C.D. Cal. Mar. 13, 2013) ... 23

*Butler v. Porsche Cars N. Am., Inc.*,
2017 WL 1398316 (N.D. Cal. Apr. 19, 2017) ... 13

*Campbell v. Facebook, Inc.*,
951 F.3d 1106 (9th Cir. 2020) ... 15, 16

*Castro v. Paragon Indus., Inc.*,
2020 WL 1984240 (E.D. Cal. Apr. 27, 2020) ... 12

*Chavez v. PVH Corp.*,
2015 WL 12915109 (N.D. Cal. Aug. 6, 2015) ... 24

*Chevron Envt'l. Mgmt. Co. v. BKK Corp.*,
2013 WL 5587363 (E.D. Cal. Oct. 10, 2013) ... 22

*Churchill Village v. Gen. Elec.*,
361 F.3d 566 (9th Cir. 2004) ... 17

*Custom LED, LLC v. eBay, Inc*,
2014 WL 2916871 (N.D. Cal. June 24, 2014) ... 23

*Delgado v. MarketSource, Inc.*,
2019 WL 4059850 (N.D. Cal. Aug. 28, 2019) ... 22

*Dennis v. Kellogg Co.*,
697 F.3d 858 (9th Cir. 2012) ... 5

*Deposit Guar. Nat'l Bank v. Roper*,
445 U.S. 326 (1980) ... 14

*Dickey v. Advanced Micro Devices, Inc.*,
2019 WL 4918366 (N.D. Cal. Oct. 4, 2019) ... 24

*Edwards v. Nat'l Milk Producers Fed'n*,
2017 WL 3623734 (N.D. Cal. June 26, 2017) ... 19, 25

*Farar v. Bayer AG*,
Case No. 14-cv-4601 (N.D. Cal.) ... 17

*Gaudin v. Saxon Mortg. Servs., Inc.*,
2015 WL 4463650 (N.D. Cal. July 21, 2015) ... 22

*Guifu Li v. A Perfect Franchise, Inc.*,
2011 WL 4635198 (N.D. Cal. Oct. 5, 2011) ... 19

*Hadley v. Kellogg Sales Co.*,
2020 WL 836673 (N.D. Cal. Feb. 20, 2020) ... 2, 4, 20

*Hadley v. Kellogg Sales Co.*,
324 F. Supp. 3d 1084 (N.D. Cal. 2018) ... passim

*Hale v. Manna Pro Prod., LLC*,
2020 WL 3642490 (E.D. Cal. July 6, 2020) ... 16

*Hanlon v. Chrysler Corp.*,
150 F.3d 1011 (9th Cir. 1998) ... 10, 13, 15

*Haralson v. U.S. Aviation Servs. Corp.*,
383 F. Supp. 3d 959 (N.D. Cal. 2019) ... 24

*Harris v. Vector Mktg. Corp.*,
2011 WL 1627973 (N.D. Cal. Apr. 29, 2011) ... 16, 17

*Harvey v. Morgan Stanley Smith Barney LLC*,
2020 WL 1031801 (N.D. Cal. Mar. 3, 2020) ... 15

*Heim v. Heim*,
2014 WL 1340063 (N.D. Cal. Apr. 2, 2014) ... 22

*Hendricks v. Ference*,
754 Fed. App'x 510 (9th Cir. 2018) ... 24

*Hendricks v. Starkist Co.*,
2016 WL 5462423 (N.D. Cal. Sept. 29, 2016) ... 24

*Hesse v. Sprint Corp.*,
598 F.3d 581 (9th Cir. 2010)....................1

*Hilsley v. Ocean Spray Cranberries, Inc.*,
2020 WL 520616 (S.D. Cal. Jan. 31, 2020)....................14

*In re Anthem, Inc. Data Breach Litig.*,
327 F.R.D. 299 (N.D. Cal. 2018)....................18, 22

*In re Bluetooth Headset Prods. Liability Litig.*,
654 F.3d 935 (9th Cir. 2011)....................16

*In re Chinese-Manufactured Drywall Prods. Liability Litig.*,
424 F. Supp. 3d 456 (E.D. La. 2020)....................15, 16

*In re High-Tech Employee Antitrust Litig.*,
2015 WL 5159441 (N.D. Cal. Sept. 2, 2015)....................18

*In re Hyundai & Kia Fuel Econ. Litig.*,
881 F.3d 679 (9th Cir. 2018)....................13

*In re Hyundai & Kia Fuel Economy Litig.*,
926 F.3d 539 (9th Cir. 2019)....................11, 12

*In re Lenovo Adware Litig.*,
2019 WL 1791420 (N.D. Cal. Apr. 24, 2019)....................24

*In re Lidoderm Antitrust Litig.*,
2018 WL 4620695 (N.D. Cal. Sept. 20, 2018)....................24

*In re Linerboard Antitrust Litig.*,
305 F.3d 145 (3d Cir. 2002)....................12

*In re Mego Fin. Corp. Sec. Litig.*,
213 F.3d 454 (9th Cir. 2000)....................23

*In re Mercury Interactive Corp. Secs. Litig.*,
618 F.3d 988 (9th Cir. 2010)....................8

*In re Nissan Motor Corp. Antitrust Litig.*,
552 F.2d 1088 (5th Cir. 1977)....................25

*In re NJOY, Inc. Consumer Class Action Litig.*,
120 F. Supp. 3d 1050 (C.D. Cal. Aug. 14, 2015)....................13

*In re Optical Disk Drive Prod. Antitrust Litig.*,
2016 WL 7364803 (N.D. Cal. Dec. 19, 2016)....................8

*In re Pharm. Indus. Average Wholesale Price Litig.*,
252 F.R.D. 83 (D. Mass. 2008) .......... 19

*In re Tableware Antitrust Litig.*,
484 F. Supp. 2d 1078 (N.D. Cal. 2007) .......... 14

*In re TFT-LCD (Flat Panel) Antitrust Litig.*,
2011 WL 7575004 (N.D. Cal. Dec. 27, 2011) .......... 8

*In re Tobacco II Cases*,
46 Cal. 4th 298 (2009) .......... 12

*In re Valeant Pharms. Int'l, Inc. Secs. Litig.*,
2020 WL 3166456 (D.N.J. June 15, 2020) .......... 12

*In re Yahoo Mail Litig.*,
2016 WL 4474612 (N.D. Cal. Aug. 25, 2016) .......... 18, 21, 22

*In re Yahoo! Inc. Customer Data Sec. Breach Litig.*,
2019 WL 387322 (N.D. Cal. Jan. 30, 2019) .......... 14, 25

*In re Yahoo! Inc. Customer Data Sec. Breach Litig.*,
2020 WL 4212811 (N.D. Cal. July 22, 2020) .......... 8, 24

*In re Zynga Inc. Secs. Litig.*,
2015 WL 6471171 (N.D. Cal. Oct. 27, 2015) .......... 16

*Jabbari v. Farmer*,
965 F.3d 1001 (9th Cir. 2020) .......... 11

*Jimenez v. Allstate Ins. Co.*,
765 F.3d 1161 (9th Cir. 2014) .......... 11

*Jones v. ConAgra Foods, Inc.*,
2014 WL 2702726 (N.D. Cal. June 13, 2014) .......... 9

*Knapp v. Art.com, Inc.*,
283 F. Supp. 3d 823 (N.D. Cal. 2017) .......... 18, 21

*Krommenhock v. Post Foods, LLC*,
2020 WL 2322993 (N.D. Cal. May 11, 2020) .......... 11

*Krommenhock v. Post Foods, LLC*,
2021 WL 750823 (N.D. Cal. Feb. 24, 2021) .......... 5, 6, 15, 21

*Krommenhock v. Post Foods, LLC*,
334 F.R.D. 552 (N.D. Cal. 2020) .......... 18

*Kutzman v. Derrel's Mini Storage, Inc.*,
2020 WL 406768 (E.D. Cal. Jan. 24, 2020) ........ 12

*Larsen v. Trader Joe's Co.*,
2014 WL 3404531 (N.D. Cal. Jul. 11, 2014) ........ 21

*Linney v. Cellular Alaska P'ship*,
151 F.3d 1234 (9th Cir. 1998) ........ 21

*Martin v. Monsanto Co.*,
2017 WL 1115167 (C.D. Cal. Mar. 24, 2017) ........ 10

*Mazza v. Am. Honda Motor Co., Inc.*,
666 F.3d 581 (9th Cir. 2012) ........ 19

*McCabe v. Six Continents Hotels, Inc.*,
2015 WL 3990915 (N.D. Cal. June 30, 2015) ........ 23

*Miller v. Ghirardelli Chocolate Co.*,
2014 WL 4978433 (N.D. Cal. Oct. 2, 2014) ........ 8

*Morales v. Kraft Foods, Inc.*,
2017 WL 2598556 (C.D. Cal. June 9, 2017) ........ 19

*Moreno v. Beacon Roofing Supply, Inc.*,
2020 WL 1139672 (S.D. Cal. Mar. 9, 2020) ........ 12

*Racies v. Quincy Bioscience, LLC*,
No. 15-cv-292 (N.D. Cal.) ........ 17

*Rodriguez v. Bumble Bee Foods, LLC*,
2018 WL 1920256 (S.D. Cal. Apr. 24, 2018) ........ 19

*Rodriguez v. W. Publ'g Corp.*,
563 F.3d 948 (9th Cir.2009) ........ 17, 19, 21

*Schneider v. Chipotle Mexican Grill, Inc.*,
2020 WL 511953 (N.D. Cal. Jan. 31, 2020) ........ 9

*Sherman v. CLP Res., Inc.*,
2020 WL 2790098 (C.D. Cal. Jan. 30, 2020) ........ 12, 16

*Shin v. Plantronics, Inc.*,
2020 WL 1934893 (N.D. Cal. Jan. 31, 2020) ........ 14

*Slezak v. City of Palo Alto*,
2017 WL 2688224 (N.D. Cal. June 22, 2017) ........ 21

*Stanton v. Boeing Co.*,
327 F.3d 938 (9th Cir. 2003) ..... 17

*Torres v. Mercer Canyons Inc.*,
835 F.3d 1125 (9th Cir. 2016) ..... 11

*Tyson Foods, Inc. v. Bouaphakeo*,
--- U.S. ----, 136 S. Ct. 1036 (2016) ..... 11

*Vasquez v. Coast Valley Roofing, Inc.*,
670 F. Supp. 2d 1114 (E.D. Cal. 2009) ..... 17

*Vincent v. Reser*,
2013 WL 621865 (N.D. Cal. Feb. 19, 2013) ..... 24

*Vinole v. Countrywide Home Loans, Inc.*,
571 F.3d 935 (9th Cir. 2009) ..... 12

*Vizcaino v. Microsoft Corp.*,
290 F.3d 1043 (9th Cir. 2002) ..... 24

*Wal-Mart Stores, Inc. v. Dukes*,
564 U.S. 338 (2011) ..... 9

*Walsh v. CorePower Yoga LLC*,
2017 WL 589199 (N.D. Cal. Feb. 14, 2017) ..... 15

*Warner v. Toyota Motor Sales, U.S.A., Inc.*,
2016 WL 8578913 (C.D. Cal. Dec. 2, 2016) ..... 19

*Weeks v. Google LLC*,
2019 WL 8135563 (N.D. Cal. Dec. 13, 2019) ..... 24

*Werdebaugh v. Blue Diamond Growers*,
2014 WL 7148923 (N.D. Cal. Dec. 15, 2014) ..... 19

*Wolin v. Jaguar Land Rover N. Am., LLC*,
617 F.3d 1168 (9th Cir. 2010) ..... 14

*Zinser v. Accufix Research Inst., Inc.*,
253 F.3d 1180 (9th Cir. 2001) ..... 14

**Statutes**

28 U.S.C. § 1715(b) ..... 6

1
2
3
4
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6
7
8
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10
11
12
13
14
15
16
17
18
19
20
21
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23
24
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27
28

**Rules**

Fed. R. Civ. P. 23(a)(2) ........ 9

Fed. R. Civ. P. 23(a)(3) ........ 10

Fed. R. Civ. P. 23(a)(4) ........ 10

Fed. R. Civ. P. 23(c)(2)(B) ........ 25

Fed. R. Civ. P. 23(h) ........ 24

**Other Authorities**

Manual for Complex Litigation (Second) § 30.44 ........ 14

## 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 May 20, 2021, at 1:30 p.m., or as soon thereafter as may be heard, Plaintiffs will move the Court, the Honorable Lucy H. Koh presiding, for an Order preliminarily approving a proposed nationwide class action settlement. The Motion is based on this Notice of Motion; the below Memorandum; the concurrently-filed Declarations of Jack Fitzgerald ("Fitzgerald Decl."), Thomas Monroe ("Monroe Decl."), Colin Weir ("Weir Decl."), and Brandon Schwartz ("Schwartz Decl."), and all exhibits thereto; all prior pleadings and proceedings had in the action; and any additional evidence and argument submitted in support of the Motion.

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

## ISSUES TO BE DECIDED

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

## MEMORANDUM OF POINTS & AUTHORITIES

### I. INTRODUCTION

Plaintiffs respectfully request preliminary approval of a proposed Settlement they believe directly addresses the Court's previously-voiced concerns. First, the Settlement is now expressly limited to releasing only those claims that, "as set forth in *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010), are based on the identical factual predicate, or depend on the same set of facts alleged in the Actions regarding the Class Products," SA ¶ 8.1.[1] Second, the Settlement Class is now limited to Class Products for which the Court already certified a California class, addressing the Court's concern regarding predominance under Rule

[1] The parties' March 9, 2021 Settlement Agreement is attached to the Fitzgerald Declaration as Exhibit 1 and cited herein as "SA."

1 23(b)(3). *See id.* ¶¶ 1.5, 1.8, 4.1. Third, in consideration of the reduced scope of the Settlement Class, the
2 previous settlement's voucher component has been eliminated, while the cash component has been increased
3 to $13 million, obviating the need for a complicated analysis or multi-step process for awarding attorneys'
4 fees. *See id.* ¶¶ 1.34, 2.1. Due to the reduction in sales covered by the Settlement, despite the removal of the
5 voucher component, and in light of the additional cash, the Settlement's $13 million non-reversionary
6 common fund is actually now more economically favorable to the Settlement Class.

7 **II. PROCEDURAL HISTORY**

8 The parties reached an initial settlement in this case in October 2019, pursuant to which Kellogg had
9 agreed to pay $12 million in cash, and to make available to the class $8.25 million in vouchers, in exchange
10 for a broad release of all products and claims Plaintiffs had challenged in two lawsuits. *See generally* Dkt.
11 No. 325, Mot. for Preliminary Approval. In February 2020, the Court denied preliminary approval because:

12 > First, the release of claims is overbroad. Second, it is unclear whether certification of the
13 > settlement class is appropriate under Federal Rule of Civil Procedure 23(b)(3). Third, the
> parties fail to provide sufficient information to justify a proposed reversion to Kellogg.
14 > Fourth, the claim form, opt-out form, and notice forms contain numerous errors that result
> in inadequate disclosure of various aspects of the settlement to class members. Fifth, the
15 > settlement structure is currently inconsistent with the fact that the voucher portion of the
> settlement constitutes a coupon settlement under the Class Action Fairness Act ("CAFA"),
16 > 28 U.S.C. § 1712.

17 *Hadley v. Kellogg Sales Co.*, 2020 WL 836673, at *2 (N.D. Cal. Feb. 20, 2020) (Koh, J.).

18 In June 2020, following a series of COVID-19-related delays, the parties attended a mediation to
19 address these issues, but for a variety of reasons, the settlement appeared to be falling apart. Believing
20 Kellogg had improperly repudiated the settlement, Plaintiffs filed a Motion to Enforce, Dkt. No. 346, and a
21 Renewed Motion for Preliminary Approval, Dkt. No. 347. Kellogg opposed the enforcement motion, Dkt.
22 No. 357, but said that, "if the Court is inclined to grant preliminary approval of the settlement agreement as
23 it is currently drafted," Kellogg "does not oppose Plaintiffs' renewed motion for preliminary approval and
24 will abide by the settlement agreement Plaintiffs presented to the Court for approval." Dkt. No. 358 at 1.

25 In November 2020, the Court held a hearing on Plaintiffs' motions. At the Court's request, Plaintiffs
26 withdrew their Motion to Enforce given Kellogg's non-opposition to the Renewed Motion for Preliminary
27 Approval. Dkt. No. 361; *see also* Dkt. No. 363, Nov. 12, 2020 Hrg. Tr. at 19:22-24. And the Court found
28 certain changes to the notices and relevant forms were satisfactory, while providing a few additional

suggestions. *See* Nov. 12, 2020 Hrg. Tr. at 42:22-47:25. But the Court was still concerned with the release language and predominance requirement given scope of the settlement class.

Regarding the release, the Court told the parties: "I view *Hesse* as requiring it has to be based on the identical factual predicate as that underlying the claims in the settled class action. That's the only thing I'm going to approve." *Id.* at 23:22-25. And regarding the settlement class, the Court explained:

> My concern is if I found previously that I could not certify a class because I agreed with the defendant's argument, it feels slightly awkward to then just turn around and say, "well, no, I'm going to certify that even though all the alleged misrepresentations might not be on all the boxes during the class period," and I haven't found a case that would give me some assurance, if this goes up on appeal from an objector, that I'm allowed to do that.

*Id.* at 30:14-21; *see also id.* at 26:2-27:9.

During the hearing, "the parties . . . committed to curing the identified deficiencies and to filing a new motion for preliminary approval of class action settlement." Dkt. No. 361, Order at 1-2. In a December 2, 2020 Joint Case Management Statement, they requested a referral to a Magistrate Judge, and the Court referred them to Magistrate Judge Nathanael Cousins. Dkt. Nos. 366-67. The parties participated in a Settlement Conference with Judge Cousins on Friday, January 22, 2021, but the case did not settle. Nevertheless, Judge Cousins and the parties agreed to resume discussions the following Tuesday, January 26. *See* Dkt. No. 372 (Minute Entry for Settlement Conference). In the interim, however, the parties continued talking and were able to reach an agreement before resuming discussions with Judge Cousins. *See* Dkt. No. 373 (Clerk's Notice vacating further Settlement Conference at the parties' request).

## III. THE SETTLMENT

### A. The Settlement Class

The Settlement Class is comprised of all persons who, between August 29, 2012 and May 1, 2020 (the "Class Period"), purchased in the United States, for household use and not for resale or distribution, one of the Class Products. SA ¶ 1.5. The Class Products include only those for which the Court certified a California class, namely: (1) Kellogg's Original Raisin Bran and Raisin Bran Crunch cereals in a package stating "heart healthy," (2) Kellogg's Smart Start Antioxidants cereal in a package stating "heart healthy" and/or "lightly sweetened," and (3) Kellogg's Frosted Mini-Wheats Bite Size (Original, Maple Brown Sugar, Strawberry, or Blueberry varieties), Big Bites (Original variety), Little Bites (Chocolate or Cinnamon Roll varieties), or Touch of Fruit in the Middle (Mixed Berry and Raspberry varieties) cereals in a package stating

"lightly sweetened." *Id.* ¶ 1.8. *Compare Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1121 (N.D. Cal. 2018) (Koh, J.).[2] By limiting the Settlement Class in this manner, the parties have addressed the Court's concern that "[t]he settlement class is significantly broader than the classes the Court previously certified," and "no longer limited to individuals who purchased products that contain the challenged statements," and have followed the Court's advice to, "[i]n any subsequent motion for preliminary approval . . . define the settlement class more narrowly." *Hadley*, 2020 WL 836673, at *3-4.[3]

**B. Benefits for the Settlement Class**

**1. Kellogg will Establish a $13 Million Non-Reversionary Settlement Fund**

As consideration for Class Members' release, Kellogg will establish a $13 million non-reversionary common fund (the "Settlement Fund") to pay Class Notice and Claims Administration; Court-approved attorneys' fees, expenses, and service awards; and Class Member claims. SA ¶ 2.1. To obtain monetary relief, a Class Member must submit an online or hard copy Claim Form. *Id.* ¶ 4.1; *see also* Fitzgerald Decl. ¶¶ 7-13 (discussing considerations in creating claims process and attaching mock-up claim form). After providing identifying information, the claimant will be asked to select the Class Products purchased since August 2012, and to state the approximate number of purchases of each product in a typical three-month period, and identify the year they began purchasing. *Id.* ¶¶ 4.1(a)-(b). An equation running behind the scenes will then determine the extrapolated number of each Class Product purchased by the claimant during the Class Period, subject to per-product caps based on a reasonable average use for the products. *See id.* ¶ 4.1(c). The equation will then calculate a "Base Damages" amount by multiplying the number of units of each Class Product purchased by a standard damages amount, which is derived from the Class's price premium damages models. *See id.* If a claimant submits proof of purchase of more than the Box Cap limit for a product in a given month (regardless of size), the claimant's Base Damages will be increased by the standard damages amount of the

[2] While Mr. Hadley did not use label limiters to define the Smart Start and Frosted Mini-Wheats Subclasses the Court certified because the record showed the consistent presence of challenged claims, to give the Court the utmost assurance of this, Kellogg now affirms that is the case, *see* Monroe Decl. ¶¶ 2-3, and the parties in all events agreed to add label limiters to the class definitions, SA ¶¶ 1.8.2 - 1.8.3

[3] To ensure finality to the litigation, Plaintiffs agreed to amend their Complaint to dismiss from the lawsuit their claims regarding Krave, Crunchy-Nut, Nutri-Grain, as reflected in their filing a Fourth Amended Complaint prior to filing this motion. Neither Plaintiffs nor their counsel have been compensated or otherwise received any consideration for dismissing these non-certified claims. There are no other agreements made in connection with the proposed settlement or Settlement Agreement. Fitzgerald Decl. ¶ 2.

purchases identified therein exceeding the per-month cap for each Class Product. *See id.* Plaintiffs' expert Colin B. Weir has determined the proportion of Raisin Bran sold during the Class Period bearing heart health claims (approximately 93.3%). Weir Decl. ¶ 13. To tether the claims process to the label limitation for the Raisin Bran Settlement Class, this proportion will be applied to the claimant's Base Damages for Raisin Bran. For example, if a claimant's Base Damages for Raisin Bran would otherwise be $10, it will instead be calculated as $9.33. Fitzgerald Decl. ¶ 10 (citing Weir Decl. ¶ 13); Monroe Decl. ¶ 4.

Based on the distribution of Base Damages calculated for all Claimants, each Claimant will be placed into one of five quintiles. For each quintile, the average damage amount will be calculated, and this will be the amount of Cash Award provided to all claimants in that quintile. SA ¶ 4.1(c). Cash Awards are subject to *pro rata* reductions or increases if claims exceed or are less than the money remaining in the Settlement Fund after other expenses. *Id.* ¶¶ 4.1(d), 4.5. Given the other Settlement expenses and predicted claims rate, the average Cash Award is predicted to be $16.09. Fitzgerald Decl. ¶¶ 14-20. Amounts remaining uncleared 180 days after Cash Awards are distributed will be provided to Class Member claimants in a supplemental distribution if practicable, or donated *cy pres*. SA ¶ 4.7. The parties agree and request that the Court order any such uncleared funds be divided equally among the American Heart Association and the UCLA Resnick Center for Food Law and Policy. *Id.* These organizations' activities are sufficiently tethered to Plaintiffs' claims and were recently preliminarily approved by Judge Orrick as *cy pres* recipients in the companion case against Post. *See Krommenhock v. Post Foods, LLC*, 2021 WL 750823, at *1 (N.D. Cal. Feb. 24, 2021) (granting preliminary approval); *Krommenhock v. Post Foods, LLC*, No. 3:16-CV-04958-WHO ["*Krommenhock*"], Dkt. No. 286-1, Settlement Agreement ("Post SA"), at ¶ 4.7 (identifying *cy pres* recipients as "the American Heart Association, the National Advertising Division of the Better Business Bureau, and the UCLA Resnick Center for Food Law and Policy"); *see also Dennis v. Kellogg Co.*, 697 F.3d 858, 866-67 (9th Cir. 2012); *compare* Fitzgerald Decl. ¶ 21 (additional information about organizations).

**2. Kellogg Will Make Substantial Labeling Commitments**

As part of the October 2019 settlement, Kellogg had agreed to remove or revise certain claims on certain products' labels. Anticipating that the settlement would be approved, Kellogg began that process in November 2019 and completed it in April 2020 (providing the basis for the current Settlement's Class Period extending through May 1, 2020). *See* Monroe Decl. ¶¶ 2-4. As part of the current Settlement, Kellogg has

agreed to the same substantive injunctive relief, and has agreed to extend its obligations to refrain from the labeling for at least one year following preliminary approval. *See* SA ¶ 5. Specifically, Kellogg has stopped, and has agreed to refrain, for at least one more year, from using "heart health" and "lightly sweetened" claims on Smart Start and Frosted Mini-Wheats, *id.* ¶¶ 5.1.1, 5.3; has made and will continue for at least one more year to make "heart health" claims less prominently on Raisin Bran, *id.* ¶ 5.1.2; and has stopped, and agreed to refrain, for at least one more year, from using on the Class Products "No High Fructose Corn Syrup," and the phrases "healthy," "wholesome," "nutritious," and "benefits" except in connection with a nutrient content claim as permitted under 21 C.F.R. § 101.65, SA ¶¶ 5.2, 5.4, 5.5.

**C. Class Notice and Claims Administration**

Subject to the Court's approval, the Parties have retained Postlethwaite & Netterville ("P&N") as the Class Administrator to effect Class Notice and Claims Administration. *See id.* ¶ 6.1 (listing duties of Class Administrator); Dkt. No. 325-1, Declaration of Jack Fitzgerald in Support of Motion for Preliminary Approval ("PA1 Fitzgerald Decl.") ¶¶ 36-41 (detailing process of vetting and selecting Class Administrator). P&N has been administering class action notice and claims since 1999 and has extensive experience in state and federal courts. Schwartz Decl. ¶¶ 2-3; *see also* Dkt. No. 347-2 at Ex. A. Several courts in this District have approved P&N as a class administrator, including in *Krommenhock*, which will involve a distribution process similar to the one proposed here. *See id.*; *Krommenhock*, 2021 WL 750823, at *2.

The Settlement provides that Class Notice will be effectuated through a Notice Plan designed by the Class Administrator to comply with the requirements of Rule 23 and approved by the Parties and Court. SA ¶ 6.3. P&N has offered a Notice Plan that meets these requirements. *See* Schwartz Decl. ¶¶ 4-7, 15-32; *see also infra* Point IV(C). On behalf of Kellogg, P&N will also serve CAFA notice upon the appropriate officials within 10 days after the filing of this motion, as required by 28 U.S.C. § 1715(b). *See* SA ¶ 6.5.

**D. The Settlement's Release**

In previously denying preliminary approval, the Court said that "[t]he parties must narrow the scope of the release consistent with Ninth Circuit law in any future settlement." *Hadley*, 2020 WL 836673, at *2. They have done so. The Settlement now provides that, upon the Effective Date, each Class Member who has not opted out will be deemed to have released Kellogg and related entities from:

> any and all claims, demands, rights, suits, liabilities, injunctive and/or declaratory relief, and causes of action, including costs, expenses, penalties, and attorneys' fees, whether known or unknown, matured or unmatured, at law or in equity, existing under federal or state law, that any Class Member has or may have against the Released Kellogg Persons that, as set forth in *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010), are based on the identical factual predicate, or depend on the same set of facts alleged in the Actions regarding the Class Products, which have been, or which could have been asserted in the Actions, and in connection with the conduct of the Actions, that have been brought, could have been brought, or are currently pending in any forum in the United States.

*See* SA ¶ 8.1.

**E. Opting Out**

Class Members who wish to be excluded must submit a Request for Exclusion (or "Opt-Out Form") to the Class Administrator, postmarked no later than the Opt-Out Deadline.[4] "Mass" or "class" opt-outs are not permitted. All Class Members who submit a timely, valid Request for Exclusion will not be bound by the terms of the Agreement, whereas all Class Members who do not submit a timely, valid Request for Exclusion will be bound by the Agreement and any Judgment. SA ¶ 6.6.

**F. Objecting**

Settlement Class Members wishing to object must, by the Objection Deadline, file with the Court or mail to the Class Administrator their written objections containing certain specific information. *See id.* ¶¶ 6.7.1. - 6.7.2. Class Members who object through an attorney must either sign the Objection themselves, or execute a separate declaration authorizing the Objection. *See id.* ¶ 6.7.3. Class Members who both object and opt out will be deemed to have opted out, and thus be ineligible to object. *Id.* ¶ 6.7.4. To appear at the Final Approval Hearing, objecting Class Members are requested, but not required, to file with the Court or mail to the Class Administrator, in advance of the Final Approval hearing, a Notice of Intent to Appear. *Id.* ¶ 6.7.5. The Parties have the right, but not the obligation to respond to any objections. *See id.* ¶ 6.7.7.

**G. Attorneys' Fees, Costs, and Service Awards**

At least 35 days before the Objection Deadline, Plaintiffs will file a Motion for Attorneys' Fees, Costs, and Service Awards to be paid from the Settlement Fund. *Id.* ¶ 3.1. Approval of the Settlement's other

[4] P&N will use the Opt-Out Form form previously submitted and approved by the Court. *See* Dkt. No. 351-15 (proposed Opt-Out Form); Dkt. No. 363, Nov. 12, 2020 Hrg. Tr. at 43:7-8 ("I though the Opt Out Form looked great, so I have no change on that.").

provisions do not depend on the Court awarding any particular amount of fees, expenses, or service awards. *Id.* ¶ 3.4. The Settlement includes a "quick pay" provision for attorneys' fees. *See id.* ¶ 3.2. These clauses 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) (Koh, J.) ["*Yahoo! III*"] ("[Q]uick-pay provisions have long been accepted in the appropriate circumstances." (citing *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *1 (N.D. Cal. Dec. 27, 2011) ("With respect [to] the 'quick pay' provisions, Federal courts, including this Court and others in this District, routinely approve settlements that provide for payment of attorneys' fees prior to final disposition in complex class actions." (collecting cases)))); *In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 WL 7364803, at *13 (N.D. Cal. Dec. 19, 2016) ("Quick pay provisions are common practice in the Ninth Circuit." (citations omitted)); *Miller v. Ghirardelli Chocolate Co.*, 2014 WL 4978433, at *5 (N.D. Cal. Oct. 2, 2014) ("'quick pay' provisions are routinely approved by courts in this district" (citation omitted)). The *Krommenhock* settlement that Judge Orrick approved included a similar quick pay provision. *See* Post SA ¶ 3.2.

**H. Timeline**

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

| Event | Day | Weeks After Preliminary Approval | Example Assuming PA Granted May 20, 2021 |
|---|---|---|---|
| Date Court grants preliminary approval | 0 | -- | May 20, 2021 |
| Deadline to commence 63-day notice period | 21 | 3 | June 10, 2021 |
| Deadline for Plaintiffs to file Motion for Attorneys' Fees, Costs, and Service Awards | 49 | 7 | July 8, 2021 |
| Notice completion date, and deadline to make a claim, opt out, and object | 84 | 12 | August 12, 2021 |
| Deadline for Plaintiffs to file Motion for Final Approval | 105 | 15 | September 2, 2021 |
| Final Approval Hearing | 119 | 17 | September 16, 2021 |

1 **IV. ARGUMENT**
2 **A. The Court Should Certify the Settlement Class**
3 The Court previously found the Rule 23(a) and 23(b)(3) elements met on behalf of a Class of
4 California consumers of Raisin Bran with "heart healthy" claims, Smart Start, and Frosted Mini Wheats. *See*
5 *Hadley*, 324 F. Supp. 3d at 1121. The Settlement Class now differs from the certified litigation Class in that
6 it is a nationwide class, rather than a California-only class. In addition, label limiter language has been added
7 to each Class Product definition, while box size limitations in the litigation class were removed because they
8 did not cover all sizes that were available to consumers.
9 **1. The Requirements of Rule 23(a) are Satisfied**
10 **a. Numerosity**
11 The Court has already found that numerosity was satisfied when considering only California
12 purchasers because they had "provided evidence that 'the unit and dollar sales' of the Kellogg products at
13 issue . . . 'suggest[ed] at least thousands of Class Members' bought these products during the class period."
14 *Hadley*, 324 F. Supp. 3d at 1093 (record citation omitted). The Settlement Class is estimated at 16 million
15 households. Schwartz Decl. ¶¶ 8-13; *see also* Weir Decl. ¶ 12, Table 1 (sales figures in the billions)
16 Accordingly, numerosity is satisfied.
17 **b. Commonality**
18 Rule 23(a)(2) is satisfied if "there are questions of law or fact common to the class," Fed. R. Civ. P.
19 23(a)(2), which means "class members 'have suffered the same injury,'" so that their claims "depend upon a
20 common contention . . . . [whose] truth or falsity will resolve an issue that is central to the validity of each
21 one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quotation
22 omitted). The Court has already found "there are numerous common questions of law and fact, such as
23 whether the challenged health statements are unlawful, unfair, deceptive, or misleading when affixed to
24 products containing 9 to 16 grams of sugar per serving . . . ." *Hadley*, 324 F. Supp. 3d at 1093-94 (citing *Jones*
25 *v. ConAgra Foods, Inc.*, 2014 WL 2702726, at *5 (N.D. Cal. June 13, 2014)). That question is similarly
26 common to the Settlement Class, and commonality is thus satisfied. *Compare Schneider v. Chipotle Mexican*
27 *Grill, Inc.*, 2020 WL 511953, at *5-6 (N.D. Cal. Jan. 31, 2020) (The court's "prior analysis under Rule 23(a),"
28 in certifying several state classes, "also applies to the [nationwide] Settlement Class," and "for purposes of

settlement, common questions predominate here because the Settlement Class Members were exposed to uniform representations . . . and suffered the same injuries." (citations omitted)).

**c. Typicality**

"Under Rule 23(a)(3), a representative party must have claims or defenses that are 'typical of the claims or defenses of the class.'" *Hadley*, 324 F. Supp. 3d at 1118 (quoting Fed. R. Civ. P. 23(a)(3)). "This requirement is permissive and requires only that the representative's claims are reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Id*. (internal quotation marks and citation omitted). Here, Plaintiffs' claims are typical of Class Members' claims because each purchased Class Products and were exposed to challenged labeling claims, allegedly losing money as a result of overpaying for products containing material misrepresentations and omissions. *See Martin v. Monsanto Co.*, 2017 WL 1115167, *4 (C.D. Cal. Mar. 24, 2017) ("claims are sufficiently typical of the class claims" where "Plaintiff alleges that she and all class members were exposed to the same statement . . . and that they were all injured in the same manner"). Accordingly, the Court should find, as it did regarding the litigation class, that "Plaintiff[s] ha[ve] satisfied Rule 23(a)'s typicality . . . requirement[ ]" because they "'allege[ ] [they] w[ere] injured when [they] paid more for the challenged products due to the price premium [Kellogg's] false and material health and wellness claims demanded in the market,'" which are "'the same injuries each [Settlement] Class Member alleges based on the same Kellogg conduct,'" *see Hadley*, 324 F. Supp. 3d at. at 1118-21 (record quotation omitted).

**d. Adequacy**

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (citation omitted). The Court has already found that the Law Office of Jack Fitzgerald, PC and Mr. Hadley are adequate. *See Hadley*, 324 F. Supp. 3d at 1121. The additional named Plaintiffs also have no conflict of interest with other Class Members, and participated in this litigation by bringing the New York action, dropping their individual claims relating to unsettled products and challenged statements, and approving the Settlement Agreement. *See* SA at 17.

In addition to re-appointing The Law Office of Jack Fitzgerald, PC as Class Counsel for the nationwide Settlement Class, Plaintiffs request that the Court appoint Sidney W. Jackson, III, of Jackson and Foster, LLC, as co-Class Counsel. On September 6, 2019, Plaintiff Hadley moved to amend Class Certification Order to add Mr. Jackson as Class Counsel to assist with trial. *See* Dkt. No. 317. He spent dozens of hours learning the case; was present at the September 9, 2019 and June 18, 2020 mediations, and the January 22, 2021 Settlement Conference; and was a material factor in obtaining the Settlement because he helped Plaintiffs pose a credible trial threat, and contributed important insight and ideas during settlement negotiations. Fitzgerald Decl. ¶ 43. Mr. Jackson has dedicated some significant time and work into the case. *See id.* ¶ 45. He was also appointed co-Class Counsel in *Krommenhock v. Post Foods, LLC*, where Judge Orrick found he "would adequately represent the class and is qualified to do so." 2020 WL 2322993, at *3 (N.D. Cal. May 11, 2020); *see also Krommenhock*, 2021 WL 750823, at *2 (appointing both firms Class Counsel for nationwide Settlement Class).

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

**a. Predominance**

"The 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Tyson Foods, Inc. v. Bouaphakeo*, --- U.S. ----, ----, 136 S. Ct. 1036, 1045 (2016) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). Courts must "make a global determination of whether common questions prevail over individualized ones," meaning predominance "is not . . . a matter of nose-counting." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) (citing *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014)). Instead, "more important questions apt to drive the resolution of the litigation are given more weight . . . over individualized questions which are of considerably less significance to the claims of the class." *Id.* "Therefore, even if just one common question predominates, 'the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately.'" *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 557 (9th Cir. 2019) ["*Hyundai*"] (quoting *Tyson Foods*, 136 S. Ct. at 1045). Furthermore, "whether a proposed class is sufficiently cohesive to satisfy Rule 23(b)(3) is informed by whether the certification is for litigation or settlement." *Id.* at 558; *see also Jabbari v. Farmer*, 965 F.3d 1001, 1005-1006 (9th Cir. 2020). "Confronted with a request for settlement-only certification, a district court need not inquire whether the case, if tried,

1 would present intractable management problems . . . for the proposal is that there be no trial." *Amchem*, 521
2 U.S. at 620 (internal citation omitted).
3 "In evaluating predominance, courts look to whether the focus of the proposed class action will be
4 on the words and conduct of the defendants rather than on the behavior of the individual class members."
5 *Kutzman v. Derrel's Mini Storage, Inc.*, 2020 WL 406768, at *7 (E.D. Cal. Jan. 24, 2020) (citation omitted);
6 *accord In re Valeant Pharms. Int'l, Inc. Secs. Litig.*, 2020 WL 3166456, at *5 (D.N.J. June 15, 2020)
7 ("[C]ommon issues predominate where [ ] 'the inquiry necessarily focuses on defendants' conduct'" (quoting
8 *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 163 (3d Cir. 2002))). That is the case here because liability
9 turns in part on whether Kellogg's advertisements were false or misleading and such claims "focus on the
10 defendant's conduct, rather than the plaintiff's damages," *In re Tobacco II Cases*, 46 Cal. 4th 298, 312
11 (2009), and do "not require the court to investigate class members' individual interaction with the product."
12 *Bradach v. Pharmavite, LLC*, 735 Fed. Appx. 251, 255 (9th Cir. 2018) (quotation omitted); *accord Sherman*
13 *v. CLP Res., Inc.*, 2020 WL 2790098, at *6 (C.D. Cal. Jan. 30, 2020) ("[P]redominance is satisfied" where
14 "the case requires determination of whether Defendants' uniformly-applied policies were lawful under
15 California law," because "adjudication of these common issues 'will help achieve judicial economy,' further
16 the goal of efficiency, and 'diminish the need for individual inquiry . . . .'" (quoting *Vinole v. Countrywide*
17 *Home Loans, Inc.*, 571 F.3d 935, 939 (9th Cir. 2009))).
18 "Class actions in which a defendant's uniform policies are challenged generally satisfy the
19 predominance requirement of Rule 23(b)(3)." *Castro v. Paragon Indus., Inc.*, 2020 WL 1984240, at *10
20 (E.D. Cal. Apr. 27, 2020) (citations omitted); *accord Moreno v. Beacon Roofing Supply, Inc.*, 2020 WL
21 1139672, at *3 (S.D. Cal. Mar. 9, 2020) (predominance where "liability would be determined by looking at
22 Beacon's uniform policies and practices"). This "is a test readily met in certain cases alleging consumer . . .
23 fraud," *Amchem*, 521 U.S. at 625, because "the crux of each consumer's claim is that a company's mass
24 marketing efforts, common to all consumers, misrepresented the company's product," so that a "cohesive
25 group of individuals suffered the same harm in the same way because of the [defendant's] alleged conduct."
26 *See Hyundai*, 926 F.3d at 559 (predominance satisfied where "class members were exposed to uniform fuel-
27 economy misrepresentations and suffered identical injuries with only a small range of damages").
28 Here, the operative Complaint challenges Kellogg's "policy and practice of marketing high-sugar

cereals with health and wellness claims" that "are deceptive because they are incompatible with the dangers of the excessive sugar consumption to which these foods contribute," Dkt. No. 376, Fourth Am. Compl. ¶ 2, and alleges the policy is uniform, *see id.* ¶¶ 118-19 ("Regardless of" "occasional changes in . . . product labeling and packaging," "Kellogg has maintained . . . a policy and practice of labeling high-sugar cereals . . . with various health and wellness claims that suggest the cereals . . . are healthy, when they are not."); *id.* ¶ 122 (alleging Plaintiffs "were the victim[s] of Kellogg's longtime and general policy and practice"). Predominance is satisfied by these allegations. *See Krommenhock*, 2021 WL 750823, at *1.

Moreover, by definition, label claims Plaintiffs challenged appear on all products included in the Settlement Class. SA ¶ 1.8. "By defining the [Class Products] in this way, Plaintiff[s] ha[ve] ensured that all [Settlement Class] members were *by definition* exposed to a [challenged] statement, and ha[ve] thereby eliminated all 'factual differences regarding . . . exposure' to that statement that could give rise to predominance issues." *See Hadley*, 324 F. Supp. 3d at 1097 (citing *In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 705 (9th Cir. 2018)). Thus, just as it found with respect to the litigation class, the Court should conclude that "Plaintiff properly defined the [Settlement Class] narrowly in order to avoid the individualized issues that would have otherwise arisen from the variations in the packaging . . . during the class period." *See Hadley*, 324 F. Supp. 3d at 1098.

Plaintiffs also asserted an omissions theory that applies to all Class Products, and this separately presents predominating common questions. *See Butler v. Porsche Cars N. Am., Inc.*, 2017 WL 1398316, at *10 (N.D. Cal. Apr. 19, 2017) ("exposure and reliance suitable for class-wide resolution . . . where the class was defined as all purchasers" and plaintiffs' "claims were based on information omitted from the product's packaging."). "In these cases, all class members were 'necessarily exposed' to the defendant's omissions on the package prior to purchase . . . ." *Id.* (citing *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1105 (C.D. Cal. 2015) (collecting cases)).

"When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis." *Hanlon*, 150 F.3d at 1022 (quotation omitted). That is the case here. The Court should find that the Settlement Class satisfies the predominance requirement. *See, e.g.*, *Broomfield v. Craft Brew Alliance, Inc.*, 2020 WL 1972505, at *4 (N.D. Cal. Feb. 5, 2020) (predominance

satisfied where "Plaintiffs allege that all Settlement Class Members were exposed to CBA's representations on the packaging of Kona Beers, which Plaintiffs allege are deceptive and material"); *Shin v. Plantronics, Inc.*, 2020 WL 1934893, at *2 (N.D. Cal. Jan. 31, 2020) ("whether . . . representations were misleading" involved "common questions [that] are central to this lawsuit and predominate over individual questions"); *Hilsley v. Ocean Spray Cranberries, Inc.*, 2020 WL 520616, at *2 (S.D. Cal. Jan. 31, 2020) ("common questions of law and fact" that "predominate over individual questions" included, *inter alia*, "whether Ocean Spray's representations . . . were false and misleading or reasonably likely to deceive consumers").

**b. Superiority**

"A consideration of the[] factors [set forth in Rule 23(b)(3)(A)-(D)] requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under [Rule 23(b)(3)] are those that can be adjudicated most profitably on a representative basis." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (quotation omitted). The superiority requirement "is met '[w]here recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis.'" *Tait*, 289 F.R.D. at 486; *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). That is true of both the certified California class, and the Settlement Class, since members of both classes "are likely to have little 'interest in controlling individual actions because the product[s]' at issue in the instant case cost 'under about $5.'" *Hadley*, 324 F. Supp. 3d at 1094 (record citation omitted) (citing *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) ("[w]here recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of" finding that the superiority requirement is satisfied)). Accordingly, the Court should find the Settlement Class satisfies the superiority requirement.

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

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

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

*CorePower Yoga LLC*, 2017 WL 589199, at *6 (N.D. Cal. Feb. 14, 2017) (citing *Hanlon*, 150 F.3d at 1027).

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

That the Settlement was reached only after significant discovery, class certification and summary judgment orders, and with trial imminent, demonstrates it resulted from arms'-length negotiations. *See* PA1 Fitzgerald Decl. ¶¶ 3-35 (detailing case history); *compare Krommenhock*, 2021 WL 750823, at *1 (finding settlement "the result of serious, informed, non-collusive, arms-length negotiations, involving experienced counsel familiar with the legal and factual issues of th[e] case"); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1122, 1127 (9th Cir. 2020) (case being "nearly [at] the close of discovery" indicated "the settlement's substantive fairness"); *In re Chinese-Manufactured Drywall Prods. Liability Litig.*, 424 F. Supp. 3d 456, 486 (E.D. La. 2020) (

> Counsel on both sides have zealously advocated for their clients for . . . years, as evidenced by the extensive discovery, motions practice, and significant resources expended in this case. The parties entered the negotiation with the experience and institutional knowledge necessary to successfully negotiate on behalf of their clients, and the settlement was accordingly achieved as a result of the adversarial process.).

Moreover, while the Settlement Class is broader than the certified California class in terms of its geographic scope, Plaintiffs having had obtained certification before negotiating a settlement demonstrates its substantive fairness. *See Campbell*, 951 F.3d at 1121-22 ("case does not implicate the 'higher standard of fairness' that applies when parties settle a case before the district court has formally certified *a* litigation class," because the settlement was "'negotiated by *a* court-designated class representative'" (emphasis added[5]) (quotation omitted)).

In addition, the Settlement was negotiated over *seven* mediations, with the assistance of court-sponsored mediator, Mark Petersen; JAMS mediator, Hon. James F. Holderman (Ret.); and Magistrate Judge Hon. Nathanael Cousins. This indicates the Settlement's fairness. *See Krommenhock,* 2021 WL 750823, at *1 ("find[ing] . . . the proposed Settlement Agreement [ ] to be fair, reasonable, [and] adequate" in part because it was "made with the assistance and mediation services of Hon. Edward A. Infante (Ret.), Hon. James F. Holderman (Ret.), and Chief Magistrate Judge Joseph C. Spero"); *Campbell*, 951 F.3d at 1122,

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

1125 ("that the settlement was the result of four in-person arms'-length mediations before two different mediators" and that the "case was extremely hard-fought, and settled at an advanced procedural stage" indicated "the settlement's substantive fairness" (internal quotation marks omitted)); *Hale v. Manna Pro Prod., LLC*, 2020 WL 3642490, at *11 (E.D. Cal. July 6, 2020) ("extensive discovery and arms-length, mediator-guided negotiations all suggest the settlement agreement is not the product of collusion"); *In re Zynga Inc. Secs. Litig.*, 2015 WL 6471171, at *9 (N.D. Cal. Oct. 27, 2015) ("The use of mediator and the presence of discovery 'support the conclusion that the Plaintiff was appropriately informed in negotiating a settlement.'" (citation omitted)); *Harris v. Vector Mktg. Corp.*, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) (use of mediator "suggests . . . [the settlement] was not the result of collusion or bad faith"); *Sherman*, 2020 WL 2790098, at *9 (

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

There are also none of the "subtle signs" of collusion that the Ninth Circuit identified in *In re Bluetooth Headset Prods. Liability Litig.* present. *See* 654 F.3d 935, 947 (9th Cir. 2011). Nothing in the Agreement purports to entitle counsel to "a disproportionate distribution of the settlement" (and Class Members *are* to "receive[] [a] monetary distribution"); nothing returns unawarded fees to Kellogg; and the Settlement Agreement includes no "clear sailing" agreement, instead providing only that counsel will apply to the Court for fees, imposing no conditions on Kellogg's response, and making the fee determination independent of the Settlement's other provisions. *See* SA ¶ 3.4. "[T]he prospect of fraud or collusion is substantially lessened where, as here, the settlement agreement leaves the determination and allocation of attorney fees to the sole discretion of the trial court." *Chinese Drywall*, 424 F. Supp. 3d at 486. Here, "[b]ecause the parties have not agreed to an amount of attorney fees and instead [will] merely petition[] the Court for an award they believe is appropriate, there is no threat of the issue tainting the fairness of the settlement negotiations." *See id.*; *Sherman*, 2020 WL 2790098, at *9 ("Attorneys' fees will be paid by . . . the Gross Settlement Amount, so the case does not present a 'clear sailing' arrangement.").

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### 2. The Settlement Does Not Grant Preferential Treatment Improperly

The Settlement does not treat the Class Representatives or any Class Members preferentially, since every Class Member who makes a claim will be subject to the same claims process that provides the same remedy based on the claimant's purchase history. That the Class Representatives will move for service awards does not change this analysis. *See Harris*, 2011 WL 1627973, at *9 (citing *Stanton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–69 (9th Cir.2009)).

### 3. The Settlement Falls within the Range of Possible Approval

"To evaluate the range of possible approval criterion, which focuses on substantive fairness and adequacy, courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer." *Harris*, 2011 WL 1627973, at *9 (quoting *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009) (citation omitted)).

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

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

#### a. The *Churchill Village* Factors Favor Preliminary Approval

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

***The Strength of Plaintiffs' Case*** and ***the Risk, Expense, Complexity, and Duration of Further Litigation.*** Plaintiffs and their counsel believe this case was strong on the merits—indeed, Plaintiffs obtained summary judgment on two misbranding claims—and the Settlement reflects that. But the case was by no means perfect or without risk. Kellogg had numerous arguments for why it would be difficult or impossible for Plaintiffs to prove up their remaining claims, or to reliably prove any amount of damages, and there was a risk the Class could lose at trial and recover nothing—as has happened in several seemingly meritorious consumer fraud class actions that have recently gone to trial in California with judgments returned for defendants. *See Farar v. Bayer AG*, Case No. 14-cv-4601 (N.D. Cal.); *Allen v. Hyland's, Inc.*, No. 12-cv-1150 DMG (MANx) (C.D. Cal.); *cf. Racies v. Quincy Bioscience, LLC*, No. 15-cv-292 (N.D. Cal.) (declaring

mistrial and decertifying class). Trial would also have been complex and expensive, since Plaintiffs would "need to prove that reasonable consumers would be misled by each particular label used for each Product during the class period . . . ." *See Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 566 (N.D. Cal. 2020). Even if Plaintiffs were successful at trial, numerous appeal issues remained, presenting both inherent risk and substantial delay. *See generally* Fitzgerald Decl. ¶¶ 22-33 (discussing settlement considerations).

These factors weigh in favor of preliminary approval. *See In re Yahoo Mail Litig.*, 2016 WL 4474612, at *6 (N.D. Cal. Aug. 25, 2016) ["*Yahoo I*"] (Koh, J.) (approving settlement where "analysis suggested some vulnerability in Plaintiffs' case" and "the Settlement obviate[d] the need for a final pretrial conference and six-day jury trial," which the record suggested "would have been contested and expensive for both sides"); *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 317-18 (N.D. Cal. 2018) (Koh, J.) ["*In re Anthem"*] (granting final approval to settlement in part because of "legal uncertainty" in that "Plaintiffs raise[d] novel issues on topics such as damages," and "if the parties had not reached a settlement, they would have had to prepare for a lengthy and costly trial," including "exploring highly technical subject matter with ten expert witnesses" making "the outcome at trial [ ] uncertain" and "subject to potential appeals, which at a minimum would have substantially delayed any recovery achieved for the class" (citations omitted)); *In re High-Tech Employee Antitrust Litig.*, 2015 WL 5159441, at *1-2 (N.D. Cal. Sept. 2, 2015) (Koh, J.) (granting final approval where "the Settlement reflect[ed] the strength of Plaintiffs' case as well as the Defendants' position," was only reached after "denial of preliminary approval of an earlier attempt to settle th[e] case," after which "the parties resumed litigation of pretrial matters" and "[t]he outcome at trial was uncertain" and "subject to potential appeals, which would have (at best) substantially delayed any potential recovery achieved for the Class at trial."); *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 832 (N.D. Cal. 2017) (Approving settlement where "[c]ase law suggests that plaintiff would have faced challenges in continuing to litigate" and "[i]n most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.")

***The Risk of Maintaining Class Action Status Through Trial.*** When the parties initially reached a settlement, Kellogg had pending a motion to decertify the Class, *see* Dkt. No. 262, which "weighs in favor of final approval." *See Yahoo! I*, 2016 WL 4474612, at *6 (factor favored approval where defendant had "requested that the Court de-certify the class" in its motion for summary judgment). Further, a "district court

1 may decertify a class at any time." *Rodriguez*, 563 F.3d at 966; *see also Guifu Li v. A Perfect Franchise, Inc.*,
2 2011 WL 4635198, at *4 (N.D. Cal. Oct. 5, 2011) (Koh, J.) ("Once discovery is complete, and the case is
3 ready to be tried, the party opposing class certification may move to decertify the class." (citation omitted)).
4 That this Court has previously decertified classes either in whole or in part further magnifies
5 Plaintiffs' risk. *See Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923, at *15 (N.D. Cal. Dec. 15,
6 2014) (Koh, J.) (granting motion to decertify class); *Brazil v. Dole Packaged Foods, LLC*, 2014 WL 5794873,
7 at *15 (N.D. Cal. Nov. 6, 2014) (Koh, J.) (granting motion to decertify damages class); *compare Morales v.*
8 *Kraft Foods, Inc.*, 2017 WL 2598556 (C.D. Cal. June 9, 2017) (Kellogg's counsel obtaining decertification
9 in a similar action). This factor thus favors approval of the Settlement, particularly since Kellogg "vigorously
10 opposed certification of a . . . class, sought (albeit unsuccessfully) to take an interlocutory appeal from that
11 order, and would undoubtedly have appealed certification if there were a final, adverse judgment."
12 *Rodriguez*, 563 F.3d at 966; *see also Edwards v. Nat'l Milk Producers Fed'n*, 2017 WL 3623734, at *7 (N.D.
13 Cal. June 26, 2017) (factor "support[ed] final approval" where "defendants vigorously opposed class
14 certification, including an appeal to the Ninth Circuit and then to the Supreme Court . . . and filed a motion
15 to decertify that was pending at the time of settlement").
16 Finally, even complete success at trial would leave Settlement Class Members outside of California
17 uncompensated. For even the possibility of obtaining the nationwide relief conferred by the Settlement, Class
18 Counsel or other attorneys would have to file and prosecute actions in all other states since—given existing
19 legal precedents—it is virtually impossible that the claims of the nationwide Settlement Class could ever be
20 adjudicated in a single forum and trial. *See*, *e.g.*, *Warner v. Toyota Motor Sales, U.S.A., Inc.*, 2016 WL
21 8578913, at *12 (C.D. Cal. Dec. 2, 2016) ("Nationwide class certification under the laws of multiple states
22 can be very difficult for plaintiffs' counsel." (citing *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 590-
23 94 (9th Cir. 2012); *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 94 (D. Mass. 2008)
24 (noting that "[w]hile numerous courts have talked-the-talk that grouping of multiple state laws is lawful and
25 possible, very few courts have walked the grouping walk"))); *Rodriguez v. Bumble Bee Foods, LLC*, 2018
26 WL 1920256, at *3 (S.D. Cal. Apr. 24, 2018) (That "[t]he parties acknowledge[d] that obtaining a nationwide
27 class may be difficult in light of recent case law . . . . weigh[ed] in favor of settlement."). Such litigation
28 would cost the respective state classes millions of dollars to prosecute, be inherently risky, and continue for

1 years, not including any appeals. *See* Fitzgerald Decl. ¶ 33.

2 ***The Settlement Amount.*** The Settlement amount is excellent compared to other settlements for this
3 type of case. *See* Fitzgerald Decl. ¶¶ 34-35. Not only is the amount reasonable in relation to the Settlement
4 Class's potential recovery, *see infra* Point IV(B)(3)(b), but it compares favorably to both the parties' previous
5 proposed settlement, which contained a voucher component but involved a larger settlement class, and with
6 a settlement recently granted preliminary approval in the similar case pending against Post.

7 First, despite having no voucher component, the present Settlement amount is more favorable to the
8 Settlement Class given the class's reduction in scope. The parties valued the voucher component of the
9 previous settlement at between $1.65 million (based on Kellogg's estimate of a 20% redemption rate) and
10 $4.95 million (based on Plaintiffs' estimate of a 60% redemption rate). *See* Nov. 12, 2020 Hrg. Tr. at 54-55.
11 Thus, the total value of the previous settlement was between approximately $13.65 million and $16.95
12 million. Taking the $15.3 million average, the $13 million amount of the present Settlement is a 15%
13 reduction. The previous settlement covered $5.3 billion in product sales. *See* Dkt. No. 325, Mot. for Prelim.
14 Approval at 16 (citing PA1 Fitzgerald Decl. ¶¶ 80-81 & Ex. I). The present Settlement covers approximately
15 $3.9 billion in sales, *see* Weir Decl. ¶ 12, Table 1, a greater than 26% reduction. Thus, the scope of the
16 Settlement Class has been reduced more than the amount of the Settlement, making it more favorable for the
17 Settlement Class. *See* Fitzgerald Decl. ¶ 24. Especially since the parties accepted the Court's advice to
18 "define the settlement class more narrowly," *Hadley*, 2020 WL 836673, at *4, the removal of the voucher
19 component is not unreasonable. *Compare* Dkt. No. 359, Reply in Supp. of Ren. Mot. for Preliminary
20 Approval at 7 (Plaintiffs acknowledging that if "'the parties agree to settle on behalf of a narrower settlement
21 class,' in the sense of 'one including fewer products and fewer consumers who purchased those products,' [
22 ] 'a commensurate reduction of the size of the common fund' . . . [is] reasonable").

23 Second, the Settlement amount compares favorably to the recent settlement reached by Plaintiffs'
24 counsel in *Krommenhock*. *See* Fitzgerald Decl. ¶ 25. The *Krommenhock* settlement is comprised of a $15
25 million non-reversionary common fund. *See Krommenhock* Dkt. No. 285, Mot. for Prelim. Approval at 1, 5;
26 Post SA ¶¶ 1.35, 2.1. That settlement covers approximately $5.6 billion of sales, and the certified California
27 class had trial damages of about $57.9 million. *See Krommenhock* Dkt. No. 286, Fitzgerald Decl. ¶¶ 26, 34.
28 The $13 million common fund here, by contrast, covers $3.9 billion of sales, with the certified class's

damages model showing maximum trial damages of between $10 million and $13.6 million. *See* Weir Decl. ¶ 14, Tables 2 & 3; Fitzgerald Decl. ¶ 23.[6] Consistent with the more economically-favorable terms for the Settlement Class here, based on the settlement amounts and estimated class sizes in this action and *Krommenhock*, claimants here are expected to receive a slightly (about 12.7%) larger average cash award: $16.09, compared to $14.28 in *Krommenhock*. *See* Fitzgerald Decl. ¶ 20; *Krommenhock* Dkt. No. 291-1, Supplement in Support of Mot. for Prelim. Approval at 1 ¶ 5.

***The Extent of Discovery Completed and Procedural Posture.*** With discovery completed and only trial remaining, "the parties ha[d] sufficient information to make an informed decision about settlement." *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (citation omitted); *see also supra* Point IV(B)(1). This favors approval. *See*, *e.g.*, *Yahoo! I*, 2016 WL 4474612, at *7 ("factor weigh[ed] in favor of final approval" where "[i]n the nearly three years" of litigation, "Class Counsel took extensive discovery, litigated this case to summary judgment, and developed an informed perspective on this case's strengths and weaknesses").

***The Experience and Views of Counsel.*** "The Ninth Circuit recognizes that 'parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation.'" *Knapp*, 283 F. Supp. 3d at 833 (quoting *Rodriguez*, 563 F.3d at 967). Accordingly, "[i]n determining whether a settlement is fair and reasonable, '[t]he opinions of counsel should be given considerable weight both because of counsel's familiarity with th[e] litigation and previous experience with cases.'" *Slezak v. City of Palo Alto*, 2017 WL 2688224, at *5 (N.D. Cal. June 22, 2017) (Koh, J.) (quoting *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, *5 (N.D. Cal. Jul. 11, 2014)).

Here, Plaintiffs' counsel has considerable experience in consumer class actions, and particularly those involving the false advertising of foods, especially as healthy. Counsel has also been litigating several similar cases during the pendency of this action, and thus has been exposed to a wide variety of information about the claims and defenses, and ultimately the potential upside and risks attendant to this case. *See*, *e.g.*, Fitzgerald Decl. ¶¶ 28-30; *see also Krommenhock*, 2021 WL 750823, at *1 (noting Class Counsel are

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[6] This is more than the approximately $9.2 million to $12.1 million Plaintiffs previously noted, *see* PA1 Fitzgerald Decl. ¶ 30, because the class period end date has been extended from October 2019 under the previous settlement, to May 1, 2020 under this Settlement Agreement.

"experienced . . . with the legal and factual issues of this case"). Counsel strongly endorses the Settlement. Fitzgerald Decl. ¶ 34-36. Accordingly, this factor favors preliminary approval. *See Delgado v. MarketSource, Inc.*, 2019 WL 4059850, at *5 (N.D. Cal. Aug. 28, 2019) (Koh, J.) (factor favored approval where "[t]he parties [were] represented by competent and experienced counsel who favor settlement" and "Plaintiff's primary attorney ha[d] litigated employment cases for 10 years"); *In re Anthem,* 327 F.R.D. at 320 (factor favored approval where "[t]he Court appointed competent and experienced counsel who ha[d] done extensive work in all types of complex class actions," who were "able to make educated assessments about the risks and possible recoveries in the current dispute" and had "endorse[d] the Settlement").

***Governmental Participation.*** There is no governmental participant, so this factor is inapplicable. *See*, *e.g.*, *Yahoo! I*, 2016 WL 4474612, at *7.

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

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

Here, Plaintiffs and Class Counsel secured for the Settlement Class direct monetary benefits of $13 million, which is reasonable in relation to potential damages. For the Class Period covered in the Settlement Agreement, if Plaintiffs successfully established liability for all claims and products the Court certified, their maximum price premium damages would have been between $10 million and $13.6 million. *See* Fitzgerald Decl. ¶ 23. The $13 million common fund is thus between 95.6% and 136% of the litigation class's potential recovery at trial. *Id.* The Settlement, however, is on behalf of a nationwide class. Mr. Weir has estimated that the maximum hypothetical nationwide damages for the Settlement Class would be between $113.6 million and $156.4 million; the Settlement Fund represents between 8.3% and 11.4% of this amount. *See id.* This "confirm[s]" "[t]he reasonableness of the Settlement" since "[d]istrict courts in the Ninth Circuit routinely approve settlements with much larger differences between the settlement amount and estimated damages."

This "confirm[s]" the "reasonableness of the Settlement," since "[d]istrict courts have approved settlements as being in good faith for payment of 3% of an alleged tortfeasor's potential liability." *Heim v. Heim*, 2014 WL 1340063, at *6 (N.D. Cal. Apr. 2, 2014) (citing *Chevron Envt'l. Mgmt. Co. v. BKK Corp.*, 2013 WL 5587363, at *3 n.2 (E.D. Cal. Oct. 10, 2013) (approving settlement representing

1 less than 3% of total clean-up costs)); *see also Custom LED, LLC v. eBay, Inc*, 2014 WL 2916871, at *4
2 (N.D. Cal. June 24, 2014) ("courts have held that a recovery of only 3% of the maximum
3 potential recovery is fair and reasonable"); *McCabe v. Six Continents Hotels, Inc.*, 2015 WL 3990915, at *10
4 (N.D. Cal. June 30, 2015) (preliminary approval of settlement representing between 0.3% and 2% of potential
5 recovery); *cf. In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000), *as amended* (June 19,
6 2000) ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery
7 does not per se render the settlement inadequate or unfair." (citation omitted)).

8 **c. The Injunctive Relief is Appropriate and Meaningful**

9 Plaintiffs and Class Counsel worked hard to obtain the Settlement's substantial injunctive relief,
10 which appropriately addresses what Plaintiffs have always maintained are the most explicit ways in which
11 Kellogg represents that the challenged cereals are healthy. This includes restricting or limiting references to
12 statements like "heart healthy," "healthy," "lightly sweetened," "no high fructose corn syrup," "wholesome,"
13 "nutritious," and "benefits." *See* SA ¶¶ 5.1 - 5.5. "[T]here is a high value to the injunctive relief obtained" in
14 consumer class actions resulting in labeling changes. *See Bruno v. Quten Research Inst., LLC*, 2013 WL
15 990495, at *4 (C.D. Cal. Mar. 13, 2013). It benefits not just Class Members, but also "the marketplace, and
16 competitors who do not mislabel their products." *Id*. The injunctive relief obtained here is especially
17 noteworthy because it effectively espouses Plaintiffs' theory of the case, prohibiting Kellogg from making
18 certain health and wellness claims based on the contribution of added sugar to the products' calories. In
19 effect, Plaintiffs have obtained through litigation what the current FDA regulations are conspicuously
20 missing, essentially a disqualifying amount of added sugar—at least for the products and claims to which the
21 injunctive relief applies. *See* Fitzgerald Decl. Ex. 20 (Blog entry at FoodDive.com discussing settlement and
22 saying companies "might want to follow Kellogg's lead," since "[t]he terms that are now off-limits are those
23 the lawsuit took issue with in the first place," "in effect validat[ing] the concerns that were brought before
24 the court," and "show[ing] these claims may soon no longer be acceptable for other cereal manufacturers.").

25 **d. The Court will Determine Reasonable Fees, Costs, and Service Awards**

26 Though "[t]he court will not approve a request for attorneys' fees until the final approval hearing, [ ]
27 class counsel should include information about the fees they intend to request and their lodestar calculation
28 in the motion for preliminary approval." Settlement Guidelines, Preliminary Approval ¶ 6. Here, Class

Counsel will request no more than 30% of the common fund, or $3.9 million. This is "within the range of awards in this circuit." *In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *4 (N.D. Cal. Sept. 20, 2018) (Orrick, J.) (collecting cases awarding one-third of the common fund); *see also Weeks v. Google LLC*, 2019 WL 8135563, at *3 (N.D. Cal. Dec. 13, 2019) (awarding 30% in case involving UCL and CLRA claims (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002)); *In re Lenovo Adware Litig.*, 2019 WL 1791420, at *8 (N.D. Cal. Apr. 24, 2019) (awarding 30%); *Hendricks v. Starkist Co.*, 2016 WL 5462423, at *12 (N.D. Cal. Sept. 29, 2016) (finding award of 30% reasonable in consumer fraud case), *aff'd sub nom., Hendricks v. Ference*, 754 Fed. App'x 510 (9th Cir. 2018))). Using current rates, Class Counsel's requested fee represents a modest 1.16 multiplier of its more than $3.35 million lodestar. *See* Fitzgerald Decl. ¶ 51.

In addition, "[a]ttorneys who create a common fund are entitled to the reimbursement of expenses they advanced for the benefit of the class." *Vincent v. Reser*, 2013 WL 621865, at *5 (N.D. Cal. Feb. 19, 2013); *see also* Fed. R. Civ. P. 23(h). Here, Class Counsel anticipates seeking reimbursement of expenses of $1,180,922.71, the majority of which relates to expert witness expenses, plus any additional costs incurred after preliminary approval. *See* Fitzgerald Decl. ¶ 52-53 & Exs. 26-27.

Finally, Plaintiffs will petition for service awards of $10,000 for Hadley and $5,000 for each of the other four Plaintiffs ($30,000 total), evidencing their time in the matter, the risks they faced, and their contributions to the sizable settlement, including by agreeing to dismiss individual claims without additional consideration in order to ensure finality to the litigation so that a classwide settlement agreement could be reached. *See, e.g.*, *Yahoo! III*, 2020 WL 4212811, at *6 ("$7,500 Service Awards for the eight Settlement Class Representatives [were] warranted based on their role in protecting the interests of the Settlement Class by being deposed and having their personal devices forensically imaged." (quotation omitted)).

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

Plaintiffs and Class Counsel submit that, given the foregoing, there are no obvious deficiencies in the Settlement. *See Dickey v. Advanced Micro Devices, Inc.*, 2019 WL 4918366, at *5 (N.D. Cal. Oct. 4, 2019); *Chavez v. PVH Corp.*, 2015 WL 12915109, at *1 (N.D. Cal. Aug. 6, 2015) (Koh, J.); *contra. Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 967 (N.D. Cal. 2019) (finding "a number of obvious deficiencies that prevent the Court from granting preliminary approval at this time").

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

"Due process requires adequate notice before the claims of absent class members are released." *Yahoo! II*, 2019 WL 387322, at *5 (citation omitted). "Rule 23 requires only the 'best notice that is *practicable under the circumstances*, including individual notice to all members who can be identified through reasonable effort.'" *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128-29 (9th Cir. 2017) (quoting Fed. R. Civ. P. 23(c)(2)(B)). P&N's proposed Notice Plan is reasonable under the circumstances. It includes targeted print and online ads, and will reach an estimated minimum 75% of Class Members, and more than twice each. *See* Schwartz Decl. ¶¶ 15-30; *see also Edwards*, 2017 WL 3623734, at *4 ("[N]otice plans estimated to reach a minimum of 70 percent are constitutional and comply with Rule 23.").

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

## V. CONCLUSION

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

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Respectfully Submitted,

/s/ Jack Fitzgerald

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