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7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE CITY AND COUNTY OF SAN FRANCISCO**

10 **PHYLLIS BRANNIN, VIRGINIA**
GOMEZ and VENUS SAVAGE,
11 **Individually and On Behalf of All Others**
12 **Similarly Situated,**

13 **Plaintiffs,**

14 **v.**

15 **GOLDEN GRAIN COMPANY and DOES**
1 through 100

16 **Defendants.**

Case No. CGC-16-555084

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR ATTORNEYS' FEES AND COSTS
AND INCENTIVE AWARDS

Date: November 5, 2020
Time: 10:00 a.m.
Dept: 303
Judge: Hon. Mary E. Wiss

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1 **I. INTRODUCTION**

2 Phyllis Brannin (“Brannin”), Virginia Gomez (“Gomez”) and Venus Savage (“Savage”)
3 (collectively, “Plaintiffs” or “Class Representatives”) submit this application for an award of
4 attorneys’ fees and costs of \$500,000, and incentive awards of \$5,000 for each of the three Class
5 Representatives, as provided in the Settlement¹ of this class action with defendant Golden Grain
6 Company (“Defendant” or “Golden Grain”). This application is made pursuant to Cal. Rules of
7 Court, Rule 3.769 and Code of Civ. Proc. § 1021.5. The amounts requested are to be paid by
8 Defendant separately from, and in addition to, all payments to Settlement Class Members. The
9 payments will not reduce any Settlement Class Members’ recovery.

10 Plaintiffs commenced this class action on behalf of all California purchasers of Near East
11 Products to recover restitution for Defendants’ alleged unlawful and deceptive packaging, and to
12 obtain injunctive relief that would address the wrongdoing alleged. The Settlement achieved the
13 lawsuit’s goals. The Settlement provides that Defendants will pay California purchasers who
14 submit a valid claim form with proof of purchase \$1.25 for every box purchased, and will pay
15 Settlement Class Members who submit valid claims without any documentation up to \$7.50 per
16 Household. In addition, the Settlement provides for an injunction requiring Golden Grain to alter
17 its packaging for five (5) years by either including a “fill line” or representation in a reasonable
18 sized type face explaining that the boxes contain empty space.

19 The requested fee and cost award should be evaluated using the lodestar-multiplier
20 method, because the fees and costs will not be paid out of the amounts recovered by Settlement
21 Class Members. Application of that method demonstrates the reasonableness of Plaintiffs’
22 request. Class Counsel overcame substantial risk in successfully prosecuting this case on a purely
23 contingent basis past demurrer and class certification, incurring a lodestar of approximately \$1.18
24 million plus out-of-pocket litigation expenses of over \$90,000. Class Counsel’s lodestar (not
25 including expenses) is almost two and a half times the requested fee and cost award. Given Class
26

27 _____
28 ¹ Declaration of Miranda P. Kolbe in Support of Motion for Preliminary Approval of
Class Action Settlement and Approval of Class Notice, Exhibit 1, Second Amended Settlement
Agreement and Release (the “Settlement”), filed with this Court on May 4, 2020.

1 Counsel’s accomplishments in this litigation in the face of substantial risk, a requested fee and
2 cost award that represents a negative multiplier of 0.42 is reasonable indeed.

3 Furthermore, Plaintiffs’ request for incentive awards of \$5,000 to each of the three Class
4 Representatives is reasonable under the circumstances of this case. Each of the Class
5 Representatives spent considerable time participating in this litigation, including by reviewing the
6 pleadings, responding to discovery and being deposed, and participating in settlement
7 discussions. Therefore, the requested incentive payments should be approved.

8 **II. RELEVANT FACTS AND PROCEDURAL HISTORY**

9 On October 28, 2016, this class action was filed in San Francisco Superior Court, alleging
10 that defendant Golden Grain Company (“Golden Grain” or “Defendant”) violated Cal. Bus. &
11 Prof. Code § 17200 (the “UCL”) by packaging and distributing certain Near East brand products
12 in boxes containing a substantial amount of nonfunctional slack fill.

13 The complaint sought restitution and injunctive relief on behalf of a Class of purchasers of
14 the Near East Products in California since October 28, 2012. On December 8, 2016, Plaintiffs
15 filed an application for complex designation which was granted on January 25, 2017.

16 On March 1, 2017, Golden Grain demurred. The demurrer was overruled on April 5,
17 2017, and Golden Grain answered the complaint on May 11, 2017.

18 On September 14, 2017, plaintiffs filed an amended complaint, adding Brannin, Gomez
19 and Savage as named plaintiffs and putative class representatives.²

20 On October 2, 2017, Plaintiffs filed a motion for certification of the Class, appointment of
21 Brannin, Gomez and Savage as Class Representatives, and appointment of Schubert Jonckheer &
22 Kolbe LLP as Class Counsel. In support of their motion, Plaintiffs submitted seven declarations,
23 including those of each of the three Plaintiffs, and declarations by a packaging expert, John
24 Caporaso (“Caporaso”), and a damages expert, Brian Bergmark (“Bergmark”). Prior to filing its
25 opposition to Plaintiffs’ motion, Defendant sought documents from and deposed Brannin, Gomez,
26 Savage, Caporaso and Bergmark. Kolbe Decl. ¶ 8.

27
28 ² The two original plaintiffs, Jackie Arcala and Debra Tuitele, voluntarily dismissed their
claims with prejudice on March 7, 2018.

1 On February 26, 2018, Defendant filed its opposition to Plaintiffs’ class certification
2 motion, supported by the declarations of two employees, Larry Czech (“Czech”), a manager at its
3 packaging facility, and Emily Prazen (“Prazen”), a marketing manager. Plaintiffs sought
4 documents from and deposed Czech and inspected Golden Grain’s packaging facility in Illinois
5 with the assistance of their packaging expert, Caporaso. Kolbe Decl. ¶ 9. Prior to the plant
6 inspection, Plaintiffs filed a “one shot” submission regarding their proposal to videotape the plant
7 inspection. *Id.* Plaintiffs also investigated Prazen’s assertions set forth in her declaration. *Id.*

8 On July 9, 2018, in conjunction with Plaintiffs’ reply papers filed in support of their
9 motion, Caporaso submitted a rebuttal declaration, and Plaintiffs moved to exclude certain of
10 Czech’s testimony. On August 24, 2018, the motion to exclude was fully briefed.

11 On September 18, 2018, the parties engaged in a full day mediation with Hon. Richard
12 Kramer (ret.). Kolbe Decl. ¶ 11. The parties mediated for a second day with Judge Kramer’s
13 assistance on September 28, 2018. *Id.* The mediations did not result in a settlement. *Id.*

14 On November 1, 2018, the Court heard Plaintiffs’ motion for class certification, and
15 ordered supplemental briefing regarding Class Notice. On November 26, 2018, Plaintiffs filed a
16 supplemental memorandum, along with a declaration by a notice expert, Linda V. Young
17 (“Young”). Golden Grain sought documents from and deposed Young on December 14, 2018.
18 Kolbe Decl. ¶ 14. On January 3, 2019, Golden Grain filed a supplemental opposition
19 memorandum, supported by the declaration of Todde B. Hilsee, Defendant’s proffered notice
20 expert. Plaintiffs investigated Hilsee’s credentials and prior testimony, as well as his assertions.
21 Kolbe Decl. ¶ 16. On January 18, 2019, Plaintiffs filed a supplemental reply brief, along with
22 rebuttal declarations by Young and another notice expert, Camron Assadi.

23 On January 24, 2019, the Court held a second hearing on Plaintiffs’ motion and, on the
24 following day, entered an order granting class certification, appointing Brannin, Gomez and
25 Savage as Class Representatives, and appointing Schubert Jonckheer & Kolbe LLP as Class
26 Counsel (the “Class Certification Order”).

27 On that same day, the Court reassigned this case, and on March 8, 2019, again reassigned
28 it, this time to Hon. Charlene Padovani Kiesselbach.

1 Following entry of the Class Certification Order, the Parties recommenced the extensive
2 arms-length settlement negotiations that they had begun with Judge Kramer’s assistance. Kolbe
3 Decl. ¶ 20. Their settlement negotiations were hard-fought and continued through 2019,
4 eventually culminating in a settlement agreement executed on December 13, 2019. *Id.*

5 On December 17, 2019, Plaintiffs filed a motion for preliminary approval of the
6 settlement and approval of class notice. After a hearing on February 7, 2020, the Court requested
7 additional briefing. Plaintiffs filed two sets of supplemental papers – the first, on March 9, 2020,
8 and the second, on May 4, 2020. On May 8, 2020, the Court granted Plaintiffs’ motion for
9 preliminary approval of Class Action Settlement and Approval of Class Notice.

10 On June 11, 2020, this case was re-assigned to Judge Mary E. Wiss for all purposes.

11 **III. ARGUMENT**

12 Plaintiffs’ motion for an award of \$500,000 for attorneys’ fees and costs, and for awards
13 of \$5,000 to each of the Class Representatives, is well supported by the work performed by Class
14 Counsel and Plaintiffs in this litigation and the results achieved.

15 Plaintiffs’ request for attorneys’ fees and costs of \$500,000 is reasonable under the
16 circumstances of this case and should be granted. Application of the lodestar-multiplier method
17 demonstrates that the requested fee and expense award represents only approximately 42% of
18 Class Counsel’s reasonable lodestar, not including over \$90,000 in out-of-pocket expenses.
19 Given Class Counsel’s success in overcoming substantial risks in this litigation by defeating
20 demurrer, successfully obtaining class certification, and achieving an equitable result for the
21 Class, Plaintiffs’ fee and cost request is modest, and is well-supported. Further, if this Court
22 determines that it is appropriate to “cross-check” its lodestar analysis by comparing the requested
23 award to the amount made available to the Class through Settlement, that cross-check would
24 corroborate the lodestar analysis: the requested award represents less than 9% of the total benefit,
25 conservatively calculated, made available to the Class through Settlement, and is well below the
26 average 33% fee awarded in California class actions and the 25% benchmark applied in federal
27 courts. In addition, the Settlement provides substantial nonmonetary benefits in the form of
28 injunctive relief.

1 Plaintiffs' request for incentive awards in the amount of \$5,000 for each of the three Class
2 Representatives also warrants approval. As discussed in more detail below, each of the Class
3 Representatives have invested considerable time in this litigation and assisted Class Counsel in
4 developing the case. The requested incentive awards fall well within the range of awards that are
5 commonly awarded in consumer class actions.

6 **A. PLAINTIFFS' REQUESTED FEE AND COST AWARD SHOULD BE**
7 **GRANTED**

8 In accordance with ¶ 50 of the Settlement, and pursuant to Code of Civ. Proc. § 1021.5,³
9 Plaintiffs apply to this Court for an award of attorneys' fees and costs of \$500,000. Plaintiffs'
10 application is appropriate, because Plaintiffs have conferred a significant benefit on a large class
11 of persons by enforcing an important right affecting the public interest.

12 Plaintiffs brought this case to enforce California policy as articulated in Cal. Bus. & Prof.
13 Code § 12606.2, protecting consumers, including the approximately 680,000 Class members,⁴
14 against misleading food packaging by including nonfunctional slack fill (empty space) in that
15 packaging. Plaintiffs' primary objectives were: (1) to obtain restitution for the Class members
16 for the amounts they overpaid, estimated by measuring the percentage of the Near East Products'
17 boxes that contained only nonfunctional empty space; and (2) to obtain a change in Defendant's
18 practices going forward.

19 This litigation has achieved both objectives. Class Counsel's work has resulted in a
20 Settlement that allows all Class members who submit valid claims supported by documentation to
21 obtain \$1.25 for every Near East Products box purchased in California during the Class Period,

22 ³ Section 1021.5 provides:

23
24 Upon motion, a court may award attorneys' fees to a successful party against one or more
25 opposing parties in any action which has resulted in the enforcement of an important right
26 affecting the public interest if: (a) a significant benefit, whether pecuniary or
27 nonpecuniary, has been conferred on the general public or a large class of persons, (b) the
28 necessity and financial burden of private enforcement are such as to make the award
appropriate, and (c) such fees should not in the interest of justice be paid out of the
recovery, if any.

⁴ Declaration of Jeanne C. Finegan, APR, filed in this case on February 7, 2020, ¶ 23
(estimating class size).

1 without limit, an amount greater than the estimated maximum restitution that would be available
2 at trial. Kolbe Decl. ¶ 28.

3 The Settlement also provides that Settlement Class Members lacking documentation can
4 also submit claims for monetary relief of \$1.25 per box, up to a maximum of \$7.50 per
5 Household. This Household limitation is reasonable, because: (1) Class Members lacking
6 documentation of their purchases would likely face greater hurdles in proving their claims at trial;
7 (2) claims of more than six (6) purchases could potentially be vulnerable to Golden Grain’s
8 “repeat purchaser” defense discussed in section III.A.4., below; and (3) because the Parties lack
9 records of purchasers against which Claims may be verified, a cap payments made to those filing
10 claims without any documentation is a reasonable way to prevent fraud. Kolbe Decl. ¶29.

11 Further, the Settlement provides for injunctive relief, requiring a change in the Near East
12 Products’ packaging for at least five (5) years to protect consumers from being misled by the size
13 of the Near East Products’ boxes. Specifically, Golden Grain has agreed to change its packaging
14 to include either a disclosure stating that the packages contain empty space or a line or graphic
15 that represents the product fill line, along with a statement such as “Fill Line,” in a reasonable
16 type face on the exterior of each box. Kolbe Decl. ¶ 30.

17 Like other consumer class actions challenging alleged deceptive business practices, this
18 litigation has societal benefits that go beyond those directly impacting the Class members:

19 Protection of unwary consumers from being duped by unscrupulous sellers is an exigency
20 of the utmost priority in contemporary society. ... Individual actions by each of the
21 defrauded consumers is often impracticable because the amount of individual recovery
22 would be insufficient to justify bringing a separate action; thus an unscrupulous seller
23 retains the benefits of its wrongful conduct. A class action by consumers produces several
24 salutary by-products, including a therapeutic effect upon those sellers who indulge in
25 fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate
26 competition, and avoidance to the judicial process of the burden of multiple litigation
27 involving identical claims.

28 *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 808.

The necessity and financial burden imposed by this litigation also make the award
appropriate. The costs incurred in litigating this case dwarfed any possible recovery by an
individual plaintiff, given that the price of the product at issue averaged only \$2.43. *Collins v.*
City of L.A. (2012) 205 Cal. App. 4th 140, 154 (“The appropriate inquiry is whether the financial

1 burden of the plaintiff’s legal victory outweighs the plaintiff’s personal financial interest.”).
2 Thus, a fee award is necessary to incentivize individuals to bring similar litigation in the future.

3 Finally, Class Counsel’s fees “should not in the interest of justice be paid out of the
4 recovery,” because there is not a traditional “common fund” in this case, and Defendant agreed to
5 pay Class Counsel’s fees and expenses separately from the amounts it agreed to pay the Class
6 Members.

7 In sum, as discussed in greater detail below, Plaintiffs’ requested fee and cost award of
8 \$500,000 is well-warranted and should be granted.

9 1. The Lodestar-Multiplier Method Should Be Used

10 In California class actions, attorneys’ fees generally may be determined by either the
11 percentage method or the lodestar-multiplier method. *Laffitte v. Robert Half International, Inc.*
12 (2016) 1 Cal. 4th 480, 489. However, in cases such as this one involving a claims-made
13 settlement, counsel’s lodestar must be considered. “[A] fee award may not be justified solely as a
14 percentage of the recovery when that award will not come from the settlement fund.” *Consumer*
15 *Privacy Cases* (2009) 175 Cal. App. 4th 545, 557, citing *Lealao v. Beneficial California Inc.*
16 (2000) 82 Cal. App. 4th 19, 49-50.⁵

17 2. Application of the Lodestar Method Demonstrates the Reasonableness 18 of Plaintiffs’ Request

19 The lodestar-multiplier method requires first calculating the plaintiff’s counsel’s lodestar
20 – i.e., the time reasonably expended by the attorneys in the litigation multiplied by their hourly
21 fees. “The lodestar figure may be adjusted, either upward or downward, to account for several
22 factors including, inter alia, the quality of the representation, the benefit obtained for the class, the
23 complexity and novelty of the issues presented, the risk of nonpayment, and any delay in
24 payment.” *Manual for Complex Litigation, Fourth*, § 14.122, pp. 194-95 (footnotes omitted).
25 Where the benefit to the class may be calculated with reasonable certainty, the fee determined by

26 _____
27 ⁵ See also *Laffitte*, 1 Cal. 5th at 503 (declining to address “whether or how the use of a
28 percentage method may be applied when there is no conventional common fund out of which the
award is to be made but only a ““constructive common fund”” created by the defendant’s
agreement to pay claims made by class members and, separately, to pay class counsel a
reasonable fee as determined by the court”) [internal citation omitted].

1 use of the lodestar-multiplier method may be “cross-checked” through use of the percentage of
2 the benefit method. *Lealao*, 82 Cal. App. 4th at 49-50. As discussed below, application of the
3 lodestar-multiplier method demonstrates that the requested fee and cost award of \$500,000 should
4 be granted. Further, comparing the fee and cost award requested to the total benefit made
5 available to the Class through this Settlement also shows that Plaintiffs’ request is reasonable.

6 **3. Class Counsel’s Lodestar Is \$1.18 Million, More Work Will Be**
7 **Required, and Plaintiffs Have Incurred Expenses of Over \$90,000**

8 Class Counsel have expended over 1600 hours to date diligently investigating and
9 prosecuting this litigation.⁶ Kolbe Decl. ¶¶ 31-32. Multiplied by their current hourly billing
10 rates,⁷ Class Counsel have accrued a lodestar of \$1,184,179. Kolbe Decl. ¶ 33. Class Counsel’s
11 current billing rates range from \$650-\$950 per hour for partners and of counsel attorneys, and
12 from \$350-\$530 per hour for associates. *Id.* ¶ 33. These are market rates in San Francisco for
13 attorneys of Class Counsel’s background and experience.⁸ See Kolbe Decl., Ex. A (Schubert

14
15 ⁶ “It is well established that California courts do not require detailed time records, and trial
16 courts have discretion to award fees based on declarations of counsel describing the work they
17 have done and the court’s own view of the number of hours reasonably spent.” *Syers Properties*
18 *III, Inc. v. Rankin* (2014) 226 Cal. App. 4th 691, 698-700 (internal quotation marks and citations
omitted.); see also *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 512;
Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 255 (“California law permits fee
awards in the absence of detailed time sheets”). Nonetheless, upon the Court’s request, Class
Counsel will provide additional information requested, including timesheets.

19 ⁷ See *LeBlanc-Sternberg v. Fletcher* (2nd Cir. 1998) 143 F.3d 748, 764 (“[C]urrent rates,
20 rather than historical rates, should be applied in order to compensate for the delay in
21 payment....”); *In re Washington Pub. Power Supply Sys. Sec. Litig.* (9th Cir. 1994) 19 F.3d 1291,
1305 (“The district court has discretion to compensate delay in payment in one of two ways: (1)
22 by applying the attorneys’ current rates to all hours billed during the course of the litigation; or
(2) by using the attorneys’ historical rates and adding a prime rate enhancement.”).

23 ⁸ See, e.g., *In re Yahoo! Inc. Customer Data Sec. Breach Litig.* (N.D. Cal. July 22, 2020)
24 No. 16-MD-02752-LHK, 2020 U.S. Dist. LEXIS 129939, at *104-05 (approving billing rates for
25 partners, depending upon experience level, ranging from about \$450 to \$900, for non-partner
26 attorneys ranging from \$160 to \$850, and for paralegals ranging from \$50 to \$380); *In re Anthem,*
27 *Inc. Data Breach Litig.* (N.D. Cal. Aug. 17, 2018) No. 15-MD-02617-LHK, 2018 U.S. Dist.
28 LEXIS 140137, at *17 (finding billing rates appropriate when “the billing rates for partners
range[d] from about \$400.00 to \$970.00,” “[t]he billing rates for non-partner attorneys, including
senior attorneys, of counsel, and associates, range[d] from about \$185.00 to \$850.00, with most
under \$500.00,” and “[t]he billing rates for paralegals, law clerks, and litigation support staff
range from about \$95.00 to \$440.00, with most under \$300.00”); *Roberts v. Marshalls of CA,*
LLC (N.D. Cal. Jan. 23, 2018) No. 13-cv-04731-MEJ, 2018 U.S. Dist. LEXIS 10884 (approving
rates between \$300 and \$750 per hour); *In re MagSafe Apple Power Adapter Litig.* (N.D. Cal.
Jan. 30, 2015) No. 5:09-CV-01911-EJD, 2015 U.S. Dist. LEXIS 11353, at *37 (“In the Bay Area,
(footnote continued)

1 Jonckheer & Kolbe LLP firm resume). Robert Schubert and Kathryn McCauley are graduates of
2 Harvard Law School, and Miranda Kolbe is a graduate of Berkeley Law School (formerly Boalt
3 Hall). Kolbe Decl. ¶ 35. Robert Schubert, Miranda Kolbe and Kathryn McCauley have over 30
4 years, 19 years, and 11 years of experience, respectively. *Id.*

5 This Motion is being submitted (and posted to the Settlement Website) before the period
6 has ended for Settlement Class Members to file claims, opt out or object. Class Counsel will do
7 more work before this case is finally resolved. Kolbe Decl. ¶ 34. This work will include
8 continued communications with Settlement Class Members, supervising the work of the Claims
9 Administrator and filing the motion for final approval of the Settlement, including opposing any
10 objections to the Settlement or this request for attorneys' fees and costs. *Id.*

11 In addition to the attorney time expended in this case, Class Counsel have incurred
12 substantial expenses. As set forth in Kolbe declaration filed herewith, Class Counsel's litigation
13 expenses to date have totaled \$91,495.13. Kolbe Decl. ¶ 36.

14 **4. Consideration of the Relevant Factors Demonstrates the**
15 **Reasonableness of Plaintiffs' Request for an Award that Comprises**
16 **Only 42% of Class Counsel's Lodestar**

17 After calculating the attorneys' lodestar, the Court must consider whether to adjust that
18 lodestar upward or downward in light of various factors, including "the quality of the
19 representation, the benefit obtained for the class, the complexity and novelty of the issues
20 presented, the risk of nonpayment, and any delay in payment." Manual for Complex Litigation,
21 Fourth, § 14.122, pp. 194-95 (footnotes omitted). Here, consideration of the relevant factors
22 demonstrates that Plaintiffs' requested fee and cost award is modest, well-deserved and should be
23 granted.

24 Plaintiffs' request contemplates no upward adjustment of Class Counsel's lodestar. To the
25 contrary, the request represents only about 42% of the lodestar, without accounting for over
26 \$90,000 in out-of-pocket litigation expenses.⁹

27 _____
28 reasonable hourly rates for partners range from \$560 to \$800, for associates from \$285 to \$510,
and for paralegals and litigation support staff from \$150 to \$240." (collecting cases).

⁹ Were the expenses considered, the lodestar-multiplier would be only 0.35.

1 Prosecution of this action has involved significant financial risk for Class Counsel. Class
2 Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery, and
3 years of work expended on this case precluded other employment by the attorneys involved.
4 Kolbe Decl. ¶ 24. Further, the underlying claims raised novel and difficult issues of law. As the
5 district court in *In re McCormick & Co.* explained, few putative slack fill class actions have
6 survived the early stages, and fewer still have been successfully certified outside of the settlement
7 context:

8 Despite the volume of slack-fill litigation, all of which has been filed as putative class
9 actions, very few have reached the stage of class certification. Many cases have been
10 dismissed for failing to plausibly allege nonfunctional slack-fill or failing to plausibly
11 allege that reasonable consumers would have been misled by the packaging even if there
12 was nonfunctional slack-fill. Slack-fill claims have also been dismissed on other
13 grounds, remanded to state court, stayed, or resolved on summary judgment, or plaintiffs
14 have decided not to pursue them. In several cases, plaintiffs have voluntarily dismissed
15 their claims (presumably due to a settlement), frequently with the plaintiffs individual
16 claims dismissed with prejudice, while the class claims are dismissed without prejudice.
17 Courts have reached the question of class certification in only six cases - one granted
18 certification, two granted certification of a settlement class, and three denied certification.

19 (D.D.C. 2019) 422 F. Supp. 3d 194, 209-10.¹⁰

20 Additional risk was posed by Golden Grain’s assertion of a repeat purchaser defense. *See*
21 *e.g.*, *Chow v. Neutrogena Corp.* (C.D. Cal. Jan. 22, 2013) No. 12-04624, 2013 U.S. Dist. LEXIS
22 17670 (holding that an inference of classwide reliance was not appropriate because, among other
23 things, “a significant portion of consumers who purchased the product were repeat purchasers.”);

24 ¹⁰ *See, e.g.*, *Clevenger v. Riviana Foods, Inc.* (C.D. Cal. Oct. 22, 2019) No. SACV 19-
25 1572 JVS (ADSx), 2019 U.S. Dist. LEXIS 228878, at *15 (granting motion to dismiss claims that
26 food product was slack filled in violation of CLRA and UCL); *Jackson v. Gen. Mills, Inc.* (S.D.
27 Cal. Sep. 20, 2019) No. 18cv2634-LAB (BGS), 2019 U.S. Dist. LEXIS 162447, at *17
28 (dismissing without prejudice claims that cereal boxes were slack filled in violation of UCL and
CLRA); *Buso v. Vigo Importing Co.* (S.D. Cal. Nov. 28, 2018) No. 18cv1328-WQH-BGS, 2018
U.S. Dist. LEXIS 201726, at *17 (granting motion to dismiss claims that risotto mix, sold in
packaging with 70% empty space, violated CLRA and UCL); *Macaspac v. Henkel Corp.* (S.D.
Cal. June 4, 2018) No. 3:17-cv-01755-H-BLM, 2018 U.S. Dist. LEXIS 93772, at *14 (granting
motion for judgment on the pleadings in case alleging that laundry product was slack filled in
violation of CLRA, UCL and FAL); *Martinez-Leander v. Wellnx Life Scis., Inc.* (C.D. Cal. Mar.
6, 2017) No. CV16-08220SJO(EX), 2017 U.S. Dist. LEXIS 91853, at *7 (dismissing slack fill
claims); *Bush v. Mondelez Int’l, Inc.* (N.D. Cal. Oct. 7, 2016) No. 16-cv-02460-RS, 2016 U.S.
Dist. LEXIS 140013, at *2 (dismissing claims of unlawfully slack filled packaging); *Turcios v.*
Carma Labs., Inc. (C.D. Cal. 2014) 296 F.R.D. 638, 642 (denying motion for class certification
of claims that Carmex lip balm was slack filled in violation of UCL and CLRA). *But see Escobar*
v. Just Born, Inc. (C.D. Cal. Mar. 25, 2019) No. CV 17-01826 TJH(PJW), 2019 U.S. Dist. LEXIS
115743, at *1 (granting motion for class certification of claims that candy product was slack
filled in violation of UCL, CLRA and FAL).

1 *Bratton v. Hershey Co.* (W.D. Mo. Feb. 16, 2018) No. 2:16-cv-4322-C-NKL, 2018 U.S. Dist.
2 LEXIS 26031 (granting summary judgment of slack fill claims brought by repeat purchaser).

3 Despite these risks, Schubert Jonckheer & Kolbe successfully overcame demurrer and
4 achieved class certification while litigating against a well-funded Defendant¹¹ represented by
5 capable counsel from Greenberg Traurig, and achieved a reasonable Settlement, which allows
6 Settlement Class Members who submit valid claims with documentation to obtain more than the
7 maximum estimated restitution they would be likely to achieve at trial. Kolbe Decl. ¶ 28.
8 Further, Settlement Class Members who lack documentation can still obtain monetary relief – up
9 to \$7.50 per Household – which is equitable in light of the risks those Class Members faced in
10 this litigation and the desire to prevent fraudulent claims. Kolbe Decl. ¶ 29. And, as noted
11 above, the Settlement also includes injunctive relief, requiring Golden Grain to change its
12 packaging for five (5) years so as to prevent consumers from being misled in the future. Kolbe
13 Decl. ¶ 30.

14 In light of Class Counsel’s successful prosecution of this case in the face of substantial
15 risks, no downward adjustment of their lodestar is warranted. Accordingly, Plaintiffs’ request for
16 an award of fees and costs totaling \$500,000, which represents a sharp discount off of Class
17 Counsel’s lodestar, should be granted.

18 **5. Cross-Checking the Lodestar Analysis with the Percentage of Benefit**
19 **Method Corroborates the Reasonableness of Plaintiffs’ Request**

20 This Court may, in its discretion, choose to cross-check its lodestar analysis by examining
21 the benefit created for the Class. Because the Claims Period is continuing, Plaintiffs lack
22 information regarding the number of claims filed and their monetary values. Plaintiffs will
23 provide that information to the Court in conjunction with their motion for final approval of the
24 Settlement and before the scheduled hearing of this Motion. Nonetheless, Plaintiffs respectfully
25 submit that, when comparing the requested fee to the value of the Settlement achieved, the
26 amount made available to the Class through this Settlement should be considered.

27
28

¹¹ Golden Grain Company is a wholly owned subsidiary of PepsiCo. See
<https://contact.pepsico.com/neareast/about-us>. - 11 -

1 This approach would be consistent with the approach taken by the majority of federal
2 courts that have considered the matter. *Masters v. Wilhelmina Model Agency, Inc.* (2d Cir. 2007)
3 473 F.3d 423, 437 (“[t]he entire Fund, and not some portion thereof, is created through the
4 efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should
5 therefore be awarded on the basis of the total funds made available, whether claimed or not.”);
6 *Waters v. Int’l Precious Metals Corp.* (11th Cir. 1999) 190 F.3d 1291, 1296-97 (rejecting
7 argument that fee should have consisted of 30 percent of funds actually claimed); *Williams v.*
8 *MGM-Pathe Commc’ns. Co.* (9th Cir. 1997) 129 F.3d 1026, 1026-27 (per curiam) (district court
9 erred by awarding class counsel a fee of only one third of the \$10,000 actually claimed rather
10 than a fee of one third of the entire \$4.5 million settlement fund or a fee based on a lodestar
11 calculation); *see also Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 480 (recognizing that all
12 class members obtain the “benefit in the fund created by the efforts of the class representatives
13 and their counsel” whether or not they choose to exercise it).

14 Further, as a policy matter, keying counsel’s fees to claims made, particularly in a case
15 such as this one, where Defendant lacks contact information for the Class members and the
16 amounts at issue are quite small, could disincentivize attorneys from bringing other consumer
17 class actions.¹²

18 The amount made available to the Class through this Settlement is substantial. As
19 previously noted, all Settlement Class Members can obtain \$1.25 for each box of Near East
20 Products they purchased by submitting a valid claim supported by proof of their purchase. An
21 estimated 36.5 million boxes were sold in California during the Class Period,¹³ making the total
22

23 ¹² *Gascho v. Glob. Fitness Holdings, LLC* (6th Cir. 2016) 822 F.3d 269, 287 (“devaluing
24 the available relief if it goes unclaimed could in many cases unduly penalize class counsel and
25 have the lasting effect of discouraging the filing of class actions in cases where few claims are
26 likely to be made but the deterrent effect of such a suit would be socially desirable,” particularly
27 in consumer class actions “where the contact information is unavailable and individual claims are
28 very small”); *In re Vioxx Prods. Liab. Litig.* (E.D. La. Sep. 26, 2018) No. 1657, 2018 U.S. Dist.
LEXIS 165201, at *26-27; *Bozak v. FedEx Ground Package Sys.* (D. Conn. July 31, 2014) No.
3:11-cv-00738-RNC, 2014 U.S. Dist. LEXIS 106042, at *18 (“Where relatively small claims can
only be prosecuted through aggregate litigation, and the law relies on prosecution by “private
attorneys general,” attorneys who fill that role must be adequately compensated for their
efforts.”).

¹³ Declaration of Daniel Tinney (“Tinney Decl.”), filed this this case on May 4, 2020, ¶ 5.

1 available relief \$45,625,000. Adding the requested fee and cost award of \$500,000 as is
2 appropriate under California law,¹⁴ brings the total to \$46,125,000, without accounting for any
3 benefit provided by the injunctive relief or the costs of notice and claims administration.

4 More conservatively, the total amount available through Settlement can be estimated by
5 multiplying 680,000, the estimated number of Settlement Class Members, by \$7.50, the
6 maximum that can be claimed per Household without documentation. This yields an available
7 recovery of \$5,100,000, plus \$500,000 in fees and costs, for a total of \$5,600,000.

8 Even if one adopts the latter, more conservative approach, Plaintiffs' requested fee and
9 expense award would still be less than 9% of the total benefit made available to the Class through
10 Settlement -- well below the average award of approximately 33%¹⁵ in California class actions
11 and the federal benchmark of 25%.¹⁶ This cross-check therefore supports approval.

12 Further, the agreed-to injunction requiring Golden Grain to change its packaging for at
13 least five (5) years further enhances the value of the Settlement to the Class. These nonmonetary
14 benefits also should be considered when comparing the requested fee with that value. *See, e.g.,*
15 *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 972-74; *Hartless v. Clorox Co.* (S.D. Cal.
16 2011) 273 F.R.D. 630, 645, *aff'd*, (9th Cir. 2012) 473 F. App'x 716; *Pokorny v. Quixtar, Inc.*
17 (N.D. Cal. July 18, 2013) No. C 07-0201 SC, 20913 WL 3790896, at *1, *appeal dismissed* (Sept.
18 13, 2013); *In re Netflix Privacy Litig.* (N.D. Cal. Mar. 18, 2013) No. 5:11-CV-00379 EJD, 2013
19 U.S. Dist. LEXIS 37286, at *7, *appeal dismissed* (Dec. 19, 2013).

23 ¹⁴ *Consumer Privacy Cases* (2009) 175 Cal. App. 4th 545, 554, quoting Herr, Ann.
24 *Manual for Complex Litigation*, supra, § 21.71, p. 525 (“the sum of the two amounts ordinarily
should be treated as a settlement fund for the benefit of the class”).

25 ¹⁵ *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 53, 66 n. 11, quoting *Shaw v. Toshiba*
26 *America Information Systems, Inc.* (E.D.Tex. 2000) 91 F. Supp. 2d 942, 972 (“Empirical studies
27 show that, regardless whether the percentage method or the lodestar method is used, fee awards in
class actions average around one-third of the recovery.”); *see also Consumer Privacy Cases*, 175
28 Cal.App.4th at 557 n. 13 (fee awards in class actions average around one third of settlement
fund).

¹⁶ *Resnick v. Frank (In re Online DVD-Rental Antitrust Litig.)* (9th Cir. 2015) 779 F.3d
934, 949.

1 **B. PLAINTIFFS’ REQUEST FOR INCENTIVE AWARDS SHOULD BE**
2 **GRANTED**

3 This Court should also approve a \$5,000 incentive award to each of Class Representatives,
4 as doing so would be just, fair and reasonable. Incentive awards are necessary to encourage
5 consumers to formally challenge perceived deceptive advertising and unlawful business conduct.

6 [C]riteria courts may consider in determining whether to make an incentive award
7 include: 1) the risk to the class representative in commencing suit, both financial and
8 otherwise; 2) the notoriety and personal difficulties encountered by the class
9 representative; 3) the amount of time and effort spent by the class representative; 4) the
10 duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class
11 representative as a result of the litigation. [Citations.]” (*Van Vranken v. Atlantic Richfield*
Co. (N.D.Cal. 1995) 901 F.Supp. 294, 299.) These “incentive awards” to class
12 representatives must not be disproportionate to the amount of time and energy expended
13 in pursuit of the lawsuit. (See *Dornberger v. Metropolitan Life Ins. Co.* (S.D.N.Y. 2001)
14 203 F.R.D. 118, 124–125.)

15 *Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1394-95.

16 During the nearly four years that this litigation has been pending, each of the Class
17 Representatives spent considerable time on the litigation, including time spent reviewing
18 pleadings, responding to discovery, preparing for deposition and being deposed, and participating
19 in settlement discussions and reviewing the settlement papers, including after amendment. Kolbe
20 Decl. ¶ 37. The Class Representatives’ continued assistance throughout the litigation was
21 instrumental to Class Counsel in formulating the legal theories of the case and developing the
22 factual record, and the recovery achieved was facilitated by the Class Representatives’ diligent
23 efforts and continued involvement. *Id.*

24 The requested incentive payments fall well within the range of incentive awards that have
25 been awarded in the past. Theodore Eisenberg & Geoffrey P. Miller (2006) *Incentive Awards to*
26 *Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1308 (An analysis of
27 incentive payments between 1993 and 2002 (374 cases) found that the median incentive payment
28 then was \$4,357, and the average was \$15,992); *see, e.g., Cellphone Termination Fee Cases*, 186
Cal. App. 4th at 1395 (approving award of \$10,000 each to four named plaintiffs where the
“representatives had, over the course of the litigation, assisted with investigation, responded to
discovery requests, reviewed documents and pleadings, and testified either in deposition or at
trial”).

1 In light of their substantial participation in this litigation and contribution to its successful
2 prosecution, Plaintiffs' request for incentive awards of \$5,000 to each of the Class
3 Representatives should be granted.

4 **IV. CONCLUSION**

5 For all of the foregoing reasons, Plaintiffs respectfully request that this Court grant their
6 application for a fee and expense award of \$500,000 to be awarded to Class Counsel, and for
7 incentive awards of \$5,000 to each of the three Class Representatives.

8
9
10 DATED: August 10, 2020

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