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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

PHYLLIS BRANNIN, VIRGINIA GOMEZ and VENUS SAVAGE, Individually and On Behalf of All Others Similarly Situated, **Plaintiffs,** **v.** **GOLDEN GRAIN COMPANY and DOES 1 through 100** **Defendants.**	**Case No. CGC-16-555084** **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** **Date:** **November 5, 2020** **Time:** **10:00 a.m.** **Dept:** **303** **Judge:** **Hon. Mary E. Wiss**

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I. INTRODUCTION

Plaintiffs Virginia Gomez ("Gomez") and Venus Savage ("Savage") (together, "Plaintiffs")[1] seek final approval of the proposed class action Settlement[2] reached with defendant Golden Grain Company ("Golden Grain" or "Defendant") on behalf of themselves and the purchasers of Near East Products in California during the period running from October 28, 2012 to May 8, 2020 (the "Settlement Class").

The Settlement satisfies all of the criteria for final settlement approval under California law and provides considerable benefit to the Settlement Class members. All Settlement Class members who submitted valid Claims during the Claims Period without proof of purchase will be entitled to payment of $1.25 for each box purchased up to a maximum of six (6) boxes per Household, and all Settlement Class members who submitted valid Claims with proof of purchase will be entitled to payment of $1.25 for each box with no limit. On a per box basis, this represents more than the maximum restitution that could be achieved at trial. In addition, the Settlement requires Golden Grain to change its packaging to protect consumers going forward from being misled by the size of the Near East Products' boxes.

No Class members have objected to the Settlement or requested exclusion. 23,327 submitted valid Claims totaling $172,685.

There is no doubt that Plaintiffs faced substantial risks in bringing their claims against Golden Grain, alleging that the Near East Products contained nonfunctional slack fill in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.* (the "UCL"). Few putative slack fill class actions have survived motions to dismiss or demurrals, and fewer still have obtained class certification, as this one did. Were this case to proceed to trial, Plaintiffs would have continued to face substantial risk, including the risk of failing to prevail on liability or of obtaining less restitution

[1] The Parties have concurrently filed a stipulation and proposed order, requesting that the Court amend the Class Certification Order to remove Phyllis Brannin as a Class Representative, because Class Counsel has been unable to contact Ms. Brannin since January of this year.

[2] The Second Amended Settlement Agreement and Release, attached as Exhibit 1 to the Declaration of Miranda P. Kolbe filed concurrently with this Motion, is referred to herein as the "Settlement." Capitalized terms used herein are defined in the Settlement.

than was made available through the Settlement, or even, no restitution at all, and of failing to obtain injunctive relief.

In light of the risks of continuing litigation, Class Counsel view the Settlement, achieved through hard bargaining over many months, including through two mediation sessions with the assistance of an experienced mediator, as a fair, reasonable, and adequate result for the Class, warranting final approval.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiffs set forth a detailed summary of the procedural history of this litigation in their Memorandum in support of their Motion for Approval of Attorneys' Fees, Costs and Incentive Awards, filed with this Court on August 10, 2020. Plaintiffs will not reiterate that history here, but instead incorporate it by reference. Below, Plaintiffs summarize their settlement negotiations with Golden Grain, and relate the relevant events that have taken place since this Court granted preliminary approval on May 8, 2020.

In September 2018, after Plaintiffs' motion for class certification had been fully briefed, but before a hearing on the motion had been held, the Parties attempted to settle this case through mediation with the assistance of a highly regarded, experienced mediator, Hon. Richard Kramer (ret.). Kolbe Decl. ¶ 4. The parties attended a full day mediation on September 18, 2018, and a second mediation a few weeks later, on September 28, 2018. *Id.* Following entry of the Court's order granting class certification, the Parties recommenced arms-length settlement negotiations. *Id*. Those negotiations continued for many months throughout 2019, and eventually the parties executed a settlement agreement on December 5, 2019. *Id*. On February 14, 2020, the Court issued an order in which it raised certain concerns regarding that agreement and requested supplemental briefing. In response to the Court's comments, the Parties renegotiated certain aspects of the agreement, ultimately executing the Second Amended Class Action Settlement and Release (the "Settlement"), which was preliminarily approved on May 8, 2020. *Id.*

Because of the substantial discovery that was completed before the Settlement was achieved, the Plaintiffs and Class Counsel were well aware of the strengths and weaknesses of this case when they entered into the Settlement. *Id*. ¶ 3. Class Counsel had served Golden Grain

with document requests, special and form interrogatories, and requests for admission, had deposed Golden Grain's manager in charge of the Near East Products' packaging procedures, had worked closely with a packing expert, a damages expert, and two experts regarding class action notice, and had inspected Golden Grain's packaging facility in Illinois along with Plaintiffs' packaging expert. *Id.* Class Counsel also defended the depositions of the three named Plaintiffs, as well as the depositions of three of their four experts. *Id.*

Following this Court's grant of preliminary approval, on June 8, 2020, the Settlement Administrator, the Heffler Group, initiated Class Notice. Declaration of Ronald A. Bertino Regarding Class Settlement Notice and Claims Administration ("Bertino Decl.") ¶¶ 5, 7-8. The Notice Plan was designed to reach an estimated 77% of the Class Members an average of 3.1 times each. *Id.* ¶ 8. Nearly 35 million online display and social media impressions were served in English and Spanish in Google search results, Facebook Instagram, Twitter, YouTube and the Spanish online network, Pulpo. *Id.* Each online advertisement contained a link to Class Notice. *Id.* The Settlement Administrator also disseminated a press release regarding the Settlement over PR Newswire's US1 Newslines, placed a full page ad in the California edition of *People Magazine*, and established a settlement website. *Id.* ¶¶ 5 & 8.

On August 10, 2020, Plaintiffs filed their motion for approval of attorneys' fees, costs and incentive awards.

The deadline for objections, requests for exclusion and claims passed on August 24, 2020. Class Counsel received no objections or requests for exclusion. Kolbe Decl. ¶ 11. The Heffler Group, the Settlement Administrator, received 23,327 valid claims totaling $172,685. Bertino Decl. ¶ 9.

III. SUMMARY OF SETTLEMENT TERMS

The Settlement provides that each Settlement Class Member who submits a valid Claim with proof of purchase will receive restitution of $1.25 per box of Near East Products purchased in California during the Class Period. Settlement ¶ 44. Settlement Class Members who submit valid Claims without any proof of purchase will recover $1.25 per box for up to six (6) boxes per Household, for total restitution of up to $7.50. *Id*. Settlement Class Members could submit

Claims either online or by mailing a completed Claim Form to the Settlement Administrator. *Id*. The Claim Form, provided in both English and Spanish, is simple and straightforward and could be completed in a few minutes. *See* Bertino Decl., Ex. A.

In addition to restitution, the Settlement provides for a change in the Near East Products' packaging, to prevent consumers going forward from being misled by the size of the boxes. Specifically, Golden Grain agreed to change its packaging for a period of at least five (5) years to include at least one of the following:

a. A disclosure on the Near East Products boxes, stating as follows: "Package contains empty space to accommodate grain to seasoning ratio. This package is sold by weight, not by volume. Contents may settle during shipping and handling." The Disclosure shall be displayed on the Near East Products' boxes in a prominent manner, including bold, prominent type at least the same font size and type face as "For questions and comments" currently displayed on the Near East Products' boxes.

b. A line or graphic that represents the product fill line and a statement communicating that the line or graphic represents the product fill line such as "Fill Line," both of which will be clearly and conspicuously depicted on the exterior packaging of the Near East Products, in conformance with Cal. Bus. & Prof. Code § 12606.2(c)(7)(C).

Settlement ¶ 43.

Golden Grain also agreed to pay Class Counsel's fees and expenses awarded by the Court not to exceed $500,000.00, to pay each of the Class Representatives an Incentive Award of $5,000, and to pay the costs of notice and claims administration, which totaled $193,688.30 as of July 31, 2020. Settlement ¶ 45; Bertino Decl. ¶ 11.

IV. THE CLASS MEMBERS RECEIVED THE BEST PRACTICABLE NOTICE

California law vests the Court with broad discretion in fashioning an appropriate notice program. Cal. Rules of Court 3.766; *Cartt v. Superior Court* (1975) 50 Cal. App.3d 960, 973-74. To protect the rights of absent class members, the parties must provide class members with the best notice practicable. *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-12; *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 174-75 (individual notice must be sent to all class members who can be identified through reasonable efforts)*; Mullane v. Central Hanover Bank & Trust Company* (1950) 339 U.S. 306, 314 (best practicable notice is that which is "reasonably

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

In its May 8, 2020 Order granting Preliminary Approval Order, the Court approved the Claim Form, Long Form Notice and the Summary Notice, and found that the Notice Plan to be implemented by the Settlement Administrator "meets the requirements of due process and constitutes the best notice practicable under the circumstances."

As discussed below, the form and method of disseminating Class Notice as previously approved were reasonably calculated to fully and accurately inform members of the Class of all material elements of the Settlement and of their opportunity to object to it or exclude themselves from the Settlement Class. Further the form and method of disseminating Class Notice was the best notice practicable under the circumstances, and was sufficient notice that complied fully with California law and due process.

A. THE FORM OF NOTICE

Class settlement notice must include sufficient information to enable Class Members to assess whether to exclude themselves from the Class. Cal. Rules of Court, Rule 3.766(d). Accordingly, the notice should include a brief explanation of the case, including the parties' basic contentions and denials, an explanation as to how to object or exclude themselves, a statement that they will be bound by the judgment if they remain within the Settlement Class, and a statement that any class member who does not request exclusion may, but is not required to, enter an appearance through counsel. *Id*.

The Notice utilized in this case satisfies the requirements for the form of notice established by California law. The Long Form Notice,[3] which was provided in both English and Spanish, employs plain, simple language to explain the basic allegations made in the case, as well as Golden Grain's denials, provides complete information regarding the terms and provisions of the Settlement, the relief available to Settlement Class Members, and the maximum amount of attorneys' fees and expenses and incentive payments that may be awarded by the Court. *See*

[3] The Summary Notice directed Class Members to the settlement website, which contains the Long Form Notice, along with other information. Bertino Decl. ¶ 5.

Bertino Decl., Ex. A. The Long Form Notice also provides information regarding how Settlement Class Members could obtain restitution and the deadline for filing Claims; explains how Class Members could opt out of the Settlement Class, including the deadline for doing so; and explains that Class Members would be bound by the Settlement if they failed to exclude themselves. *See id.* Further, the Notice explains that Settlement Class Members could object to the Settlement, and are permitted, but are not required to attend the Final Approval Hearing with or without an attorney to represent them. *See id.*

Accordingly, the form of Notice complied with the standards of fairness, completeness, and neutrality required of settlement class notice disseminated under authority of the Court.

B. THE METHOD OF CLASS NOTICE

California law vests the Court with broad discretion in fashioning an appropriate notice program. The California Supreme Court has held that notice is appropriate if it has a "reasonable chance of reaching a substantial percentage of the class members." *Cartt,* 50 Cal. App.3d at 974. California cases recognize notice to class members should be handled with "pragmatism" and "flexibility" and with due consideration of the economic feasibility of the proposed manner of notice. *Cooper v. Am. Savings* (1976) 55 Cal. App. 3d 274, 285; *see also Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 983 ("'the representative plaintiff in a California class action is not required to notify individually every readily ascertainable member of his class without regard to the feasibility of such notice; he need only provide meaningful notice in a form that 'should have a reasonable chance of reaching a substantial percentage of the class members.'") [citations omitted]. Cal. Rules of Court, Rule 3.766(e) prescribes a pragmatic approach, stating that, when assessing the manner of notice, the court must consider:

(1) The interests of the class;

(2) The type of relief requested;

(3) The stake of the individual class members;

(4) The cost of notifying class members;

(5) The resources of the parties;

(6) The possible prejudice to class members who do not receive notice; and

(7) The res judicata effect on class members.

Further, Rule 3.766(f) provides that notice by publication may be warranted when *any* of the following conditions exist: (1) "personal notification is unreasonably expensive"; (2) "the stake of individual class members is insubstantial"; or "it appears that all members of the class cannot be notified individually." *See also Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1548-1549 (all three conditions set forth in Rule 3.766(f) do not need to be met to permit notice by publication).

Accordingly, California courts have held that notice by publication may be appropriate in cases involving large classes with relatively small monetary damages. *Cooper*, 55 Cal. App. 3d at 285 (notice by publication is appropriate where the size of the class is large and damages are minimal); *Cartt,* 50 Cal. App.3d at 974 (reversing order requiring dissemination of personal notice to 700,000 persons at a cost of $70,000, reasoning that a less expensive form of notice – i.e., notice by publication – would be more appropriate); *Noel,* 7 Cal.5th at 985 (reasoning that individual notice may not be required in case involving 20,000 class members, "given the modest amount at stake (the [product at issue] having retailed for $59.99), the odds that any class member will bring a duplicative individual action in the future are effectively zero"); *see also id*. at 981 ("due process does not dictate that certification of a putative plaintiff class invariably must depend on all absent class members being sent (much less receiving) individual notice of the action").[4]

The method of notice utilized here was is the best method of notice practicable under the circumstances, complied with California law, including Rule 3.766(e) and (f), and was consistent with the due process interests of the absent Class members. The size of the Class is very large –

[4] *See also Mullins v. Direct Digital, LLC* (7th Cir. 2015) 795 F.3d 654, 665 (personal notice is not required in consumer cases involving small damages, because "[O]nly a lunatic or a fanatic would litigate [such a small damages] claim individually" and "so opt-out rights are not likely to be exercised by anyone planning a separate individual lawsuit."); *Briseno v. ConAgra Foods, Inc.* (9th Cir. 2017) 844 F.3d 1121, 1129 (rejecting requirement of individual notice in cases involving low-cost consumer products, as such a requirement would protect "a purely theoretical interest" over "any possible recovery" for the absent class members "in precisely those cases that depend most on the class mechanism."); *see also id*. (noting that "[c]ourts have routinely held that notice by publication in a periodical, on a website, or even at an appropriate physical location is sufficient to satisfy due process").

numbering approximately 680,000– and the individual Class members' interests are relatively insubstantial, given that the Near East Products' average cost is $2.43 per box. Bertino Decl. ¶ 9; Declaration of Emily Praven in Support of defendant Golden Grain Company's Opposition to Plaintiffs' Motion for Class Certification, filed in this matter on February 28, 2018 ("Praven Decl.") ¶ 7. Further, Golden Grain did not possess a Class list, and the Near East Products were sold by a wide variety of retailers, including grocery stores, mass retailers, natural food stores, club stores, convenience stores, and e-commerce retailers throughout California, rendering the provision of individual notice infeasible. Praven Decl. ¶ 4.

Consistent with the guidance provided by the Federal Judicial Center, Notice was disseminated by an experienced settlement administrator in a manner designed to reach a high percentage of the Class Members – 77% -- on average 3.1 times each. Bertino Decl. ¶ 8. Pursuant to the Notice Plan, Class Notice was disseminated throughout a 31 day period, commencing on June 8, 2020, and involved the purchase of nearly 35 million online display and social media impressions placed in Google Search results, Facebook, Instagram, Twitter, YouTube and the Spanish online network, Pulpo. *Id*. Each online ad contained a link to the Long Form Notice. *Id.* In addition, Summary Notice was published via a full page ad in the California edition of *People Magazine*, and the Settlement Administrator disseminated a press release regarding the Settlement over PR Newswire's US1 Newslines. *Id.*. Further, the Long Form Notice in both English and Spanish, together with English and Spanish versions of the Claim Form, were published on a settlement website, along with other relevant information. *Id.* ¶ 5.

The thoroughness of the notice in this case substantially exceeds notice that has been approved by California courts, and satisfies California law and due process. *See, e.g.*, *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1805 (ruling over objection that notice published in *USA Today* was sufficient); *Hypertouch*, 128 Cal.App.4th at 1536, 1555 & fn. 18 (endorsing publication in *USA Today* if personal notice was not feasible); *see also, e.g., Larsen v. Trader Joe's Co*. (N.D. Cal. July 11, 2014, No. 11-cv-05188-WHO) 2014 U.S. Dist. LEXIS 95538, at *37 (approving plan providing for publication notice in *USA Today* and by a press release

distributed through PR Newswire to reach class members for whom contact information was not available).

V. FINAL SETTLEMENT APPROVAL IS APPROPRIATE

The Settlement meets all of the relevant criteria for final approval. The well-recognized factors to be considered in assessing the reasonableness of a class action settlement, articulated in *Dunk,* include: (1) the amount offered in settlement; (2) the reaction of class members to the proposed settlement; (3) the strength of plaintiff's case; (4) the risk, complexity and likely duration of further litigation; (5) the extent of discovery completed and the state of the proceedings; and (6) the experience and views of counsel. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128, citing *Dunk*, 48 Cal.App.4th at 1801. As set forth below, consideration of each of these factors demonstrates that the Settlement should be approved.

A. THE AMOUNT OFFERED IN SETTLEMENT

Plaintiffs brought this case to enforce California policy as articulated in Cal. Bus. & Prof. Code § 12606.2, protecting consumers, including the approximately 680,000 Class members,[5] against misleading food packaging by including nonfunctional slack fill (empty space) in that packaging. Plaintiffs' primary objectives were: (1) to obtain restitution for the Class members for the amounts they overpaid, estimated by measuring the percentage of the Near East Products' boxes that contained only nonfunctional empty space; and (2) to obtain a change in Defendant's practices going forward. The Settlement achieves both objectives.

Based upon the testimony of Plaintiffs' packaging and damages experts, John Caporaso and Brian Bergmark, respectively, Class Counsel have estimated that the maximum restitution that could be awarded at trial would range from $0.53 to $1.18 per box. Kolbe Decl. ¶ 6. Based upon Golden Grain's estimate that 36.5 million boxes were sold in California during the Class Period, maximum classwide restitution could range between $19 and $43 million. *Id.* ¶ 7.

The Settlement provides substantial relief to the Class. The Settlement permits all Settlement Class members who submit valid claims supported by documentation to obtain $1.25

[5] Bertino Decl. ¶ 9 (estimating Class size).

for every box of Near East Products purchased in California during the Class Period, without limit, and allows those Settlement Class members who lack documentation to submit claims for $1.25 per box for up to a maximum of six boxes, or $7.50. Settlement ¶ 44. Class members could submit Claims online by filling out a simple form that could be completed in minutes. *See* Bertino Decl., Ex. A. A claims-made settlement was reasonable in this case, because defendant Golden Grain has testified that it does not possess information regarding the identities of the Class, and the Near East Products are sold at a wide variety of retailers throughout California, making obtaining a class list infeasible. *See* Praven Decl. ¶ 4; Kolbe Decl. ¶ 5. For that same reason, a claims procedure would likely have been required even if this case had proceeded to trial. *Laguna v. Coverall N. Am., Inc.* (9th Cir. 2014) 753 F.3d 918, 934 (a claims process is unavoidable in consumer class actions where "there is no readily accessible record of purchases to identify class members and their contact information").

The amount available through Settlement weighs in favor of its approval. On a per box basis, the Settlement represents more than Class Counsel's estimate of the maximum that could be awarded at trial, indicating that approval is warranted. Kolbe Decl. ¶ 6; *Fitzhenry-Russell v. Coca-Cola Co.* (N.D.Cal. Oct. 3, 2019) 2019 U.S.Dist.LEXIS 232216, at *19 (reasoning that, where the recovery on a per unit basis exceeded the plaintiff's estimated damages, approval was warranted, particularly because "it would be necessary to use a claim process to direct the recovery to the actual class members, as Defendant did not possess records that identified the retail purchasers"). The limitation on Household recovery for those Class members who submit Claims unsupported by documentation is reasonable, because of the difficulties of proof that Class members lacking documentation could face at trial, and because the limitation is a reasonable measure to prevent fraudulent claims. Kolbe Decl. ¶ 6.

The total amount made available to the Class can be estimated by multiplying the amount made available on a per box basis by the number of boxes sold in California during the Class Period ($1.25 X 36.5 million) or, more conservatively, by multiplying the estimated number of Class members by the maximum available per Household for those who submit Claims without any proof of purchase (680,000 X $7.50). Kolbe Decl. ¶ 7; Bertino Decl. ¶ 3. Adding the

requested attorneys' fees and costs award of $500,000, as well as the costs of providing notice and settlement administration, which as of July 31, 2020 totaled close to $200,000, to the more conservative estimate of the amount made available to the Class by this Settlement yields a total Settlement value of approximately $5.8 million.

Further, the Settlement provides for injunctive relief, requiring a change in the Near East Products' packaging for at least five (5) years to protect consumers from being misled by the size of the Near East Products' boxes. Kolbe Decl. ¶ 8. Specifically, Golden Grain has agreed to change its packaging to include either a disclosure stating that the packages contain empty space or a line or graphic that represents the product fill line, along with a statement such as "Fill Line," in a reasonable type face on the exterior of each box. Settlement ¶ 44. While it is difficult to ascribe a monetary value to this aspect of the settlement, the agreed-upon disclosure on the face of the packaging directly addresses the Plaintiffs' allegations and weighs in favor of approval. *See, e.g., Fitzhenry,* 2019 U.S.Dist.LEXIS 232216, at *17-18 (finding that agreed-upon injunction requiring change in product labeling provided significant relief to the class, weighing in favor of its approval), quoting *Kwikset v. Superior Court* (2011) 51 Cal. 4th 310, 337 ("Injunctions are the primary form of relief available under the UCL to protect consumers from unfair business practices, while restitution is a form of ancillary relief.").

Because the Settlement provides for substantial relief to the Class, this factor weighs in favor of granting final approval.

B. THE REACTION OF CLASS MEMBERS

The deadline for objections, requests to opt out, and the filing of Claims passed on August 24, 2020. Class Counsel has not received any objections or requests for exclusion. Kolbe Decl. ¶ 11. The Settlement Administrator received 23,327 valid Claims for $172,685. Bertino Decl. ¶ 9.

The absence of any objections to or requests for exclusion from the Settlement weigh in favor of its approval. *Cruz v. Sky Chefs, Inc.* (N.D. Cal. Dec. 19, 2014) 2014 U.S. Dist. LEXIS 176393, at *5 ("A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it."). *Williams v. Costco Wholesale Corp.* (S.D. Cal. July 7, 2010) 2010 U.S. Dist. LEXIS 67731, at *5 ("The absence of a large number of

objections to a proposed class action settlement raises a strong presumption that the terms of a proposed settlement are favorable to the class members.").

Further, the claims rate of 3.4% is commensurate with that experienced in class action settlements involving small dollar amounts, and courts have regularly approved settlement with substantially lower claims rates. Bertino Decl. ¶ 9; *see, e.g.*, *Poertner v. Gillette Co.* (11th Cir. 2015) 618 F. App'x 624, 625-26 (approving a settlement where the claims rate was roughly 0.75% of a class of approximately seven million); *LaGarde v. Support.com, Inc.* (N.D. Cal. Mar. 26, 2013) 2013 U.S. Dist. LEXIS 42725, at *2-10 (approving class action settlement with a claims rate of 0.17%); *In re Apple iPhone 4 Prods. Liab. Litig.* (N.D. Cal. Aug. 10, 2012) 2012 U.S. Dist. LEXIS 113876, at *1-3 (approving a class action settlement with claims rate between 0.16% and 0.28%); *Trombley v. Bank of Am. Corp.* (D. R.I. May 4, 2012) 2012 U.S. Dist. LEXIS 63072, at *2 (approving a class action settlement with a 0.9% claims rate); *In re Packaged Ice Antitrust Litig.* (E.D. Mich. Dec. 13, 2011) 2011 U.S. Dist. LEXIS 150427, at *14 (approving a class action settlement with a claims rate of less than 1%).

The response of the Class to the Settlement weighs in favor of its approval.

C. THE STRENGTH OF PLAINTIFFS' CASE AND THE RISK, COMPLEXITY AND LIKELY DURATION OF FURTHER LITIGATION

"The proposed settlement cannot be judged without reference to the strength of plaintiffs' claims. The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Kullar*, 168 Cal.App.4th at 130, internal citations and quotation marks omitted. Class Counsel believes that the claims asserted by the Class Representatives on behalf themselves and the Class Members against Golden Grain for unlawful, deceptive and unfair business practices in violation of the UCL are meritorious and that they would be successful at trial. Kolbe Decl. ¶ 9. Nevertheless, Plaintiffs faced substantial risks in bringing their claims. *Id*. The state of law regarding slack fill claims is uncertain. As the district court in *In re McCormick & Co*. explained, few putative slack fill class actions have survived the early stages, and fewer still have been successfully certified outside of the settlement context:

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

(D.D.C. 2019) 422 F. Supp. 3d 194, 209-10.[6] Despite these risks, Plaintiffs successfully overcame demurrer and achieved class certification while litigating against a defendant that was represented by capable counsel from Greenberg Traurig.

Nonetheless, if this case had not been settled, the litigation would certainly have been lengthy and hard-fought, with the outcome uncertain. To the best of Class Counsel's knowledge, no class action involving slack fill claims has ever been successfully litigated through trial. Kolbe Decl. ¶ 9. Plaintiffs faced the risk of a motion to decertify the class, or possibly a motion for summary judgment, based upon Golden Grain's asserted repeat purchaser defense. *Id.; see e.g., Chow v. Neutrogena Corp*. (C.D. Cal. Jan. 22, 2013) 2013 U.S. Dist. LEXIS 17670 (holding that an inference of classwide reliance was not appropriate because, among other things, "a significant portion of consumers who purchased the product were repeat purchasers."); *Bratton v. Hershey Co*. (W.D. Mo. Feb. 16, 2018) 2018 U.S. Dist. LEXIS 26031 (granting summary

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[6] *See, e.g., Clevenger v. Riviana Foods, Inc.* (C.D. Cal. Oct. 22, 2019) 2019 U.S. Dist. LEXIS 228878, at *15 (granting motion to dismiss claims that food product was slack filled in violation of CLRA and UCL); *Jackson v. Gen. Mills, Inc.* (S.D. Cal. Sep. 20, 2019) 2019 U.S. Dist. LEXIS 162447, at *17 (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) 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) 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) 2017 U.S. Dist. LEXIS 91853, at *7 (dismissing slack fill claims); *Bush v. Mondelez Int'l, Inc.* (N.D. Cal. Oct. 7, 2016) 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) 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).

judgment of slack fill claims brought by repeat purchaser). Further, Plaintiffs faced the risk that Golden Grain would have prevailed in resisting Plaintiffs' damages models, or of its arguing persuasively that the amount of restitution warranted was substantially less than that estimated by Plaintiffs' experts, including by showing that some or all of the empty space in the Near East Products' boxes was "functional," as that term is used in Cal. Bus. & Prof. Code § 12606.2. Kolbe Decl. ¶ 9.

Therefore, consideration of the strength of Plaintiffs' case and the risk, complexity and likely duration of further litigation weighs in favor of final approval.

D. THE EXTENT OF DISCOVERY COMPLETED AND THE STAGE OF THE LITIGATION

The extent of discovery that has been completed and the stage of the litigation are factors that courts consider in determining the fairness of a settlement. *See Dunk*, 48 Cal. App. 4th at 1801; *Girsh v. Jepson* (3rd Cir. 1975) 521 F.2d 153, 157; *Weinberger v. Kendrick* (3rd Cir. 1975) 698 F.2d 61, 74. In particular, courts consider whether the litigation has progressed to the extent that the "parties have sufficient information to make an informed decision about settlement.'" *Betancourt v. Advantage Human Resourcing, Inc*. (N.D. Cal. Jan. 28, 2016) 2016 WL 344532, at *5, quoting *Linner v. Cellular Alaska P'ship* (9th Cir. 1998) 151 F.3d 1234, 1239. Here, there can be no doubt that the parties possessed "sufficient information to make an informed decision about settlement" when this Settlement was finally achieved.

As set forth in detail in the Memorandum filed in support of Plaintiffs' Motion for Approval of Attorneys' Fees, Costs and Incentive Awards, Plaintiffs conducted substantial discovery prior to reaching the instant Settlement, including substantial written discovery, working closely with four experts, conducting an inspection of Golden Grain's packaging facility along with one of their experts, deposing Golden Grain's plant manager, and defending the depositions of three of Plaintiffs' expert witnesses and the three named plaintiffs. Kolbe Decl. ¶ 3. The facts of the case had been substantially developed by the time Settlement was achieved, because class certification was a hotly contested, fact intensive inquiry. *Id.*. As a result, the parties negotiated the Settlement with ample knowledge of the strengths and weaknesses of this case and the amounts necessary to compensate Class Members. *Id*.

Because Class Counsel had conducted sufficient discovery in advance of achieving the Settlement, this factor weighs in favor of granting final approval.

E. THE EXPERIENCE AND VIEWS OF COUNSEL

The Schubert firm specializes in complex class action litigation and has considerable experience litigating consumer class actions. Kolbe Decl. ¶ 1. The Settlement was achieved through extensive, arms-length negotiation, including with the assistance of a highly-regarded, experienced mediator, Hon. Richard A. Kramer (ret.). *Id.* ¶ 4. Based upon Class Counsel's experience litigating class actions, and their analysis of the risks presented in this case as well as the results in similar cases, Class Counsel believe that the proposed Settlement is fair, reasonable and adequate and warrants final approval. *Id.* ¶ 10. Accordingly, this factor also supports granting final approval.

VI. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court approve the Settlement, award the requested attorneys' fees and expenses and incentive awards, and schedule a date for a report on the amount of Settlement Awards paid.

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