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ELECTRONICALLY
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Superior Court of California,
County of San Francisco

12/17/2019
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BY: JUDITH NUNEZ
Deputy Clerk

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**
Similarly Situated,

12 **Plaintiffs,**

13 v.

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

16 **Defendants.**

Case No. CGC-16-555084

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT AND
APPROVAL OF CLASS NOTICE

Date: February 7, 2020

Time: 1:30 p.m.

Dept: 318

Judge: Hon. Charlene Padovani
Kiesselbach

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1 **I. INTRODUCTION**

2 Phyllis Brannin, Virginia Gomez and Venus Savage (“Plaintiffs” or “Class
3 Representatives”) seek preliminary approval of a Settlement¹ on behalf of themselves and the
4 certified Class of purchasers of Near East Products in California during the period running from
5 October 28, 2012 to the date of preliminary approval of the Settlement (the “Class Period”). In
6 addition, Plaintiffs seek approval of the proposed form and method of Class Notice, and ask the
7 Court to set deadlines for filing Claims, objecting to and opting out of the Settlement, and to
8 schedule a hearing for final fairness review.

9 This case was filed in the Superior Court for the City and County of San Francisco on
10 October 28, 2016, alleging that defendant Golden Grain Company (“Defendant” or “Golden
11 Grain”) packs and distributes the Near East Products in boxes containing a substantial amount of
12 nonfunctional slack fill in violation of Cal. Bus. & Prof. Code § 12606.2, and seeking restitution
13 and injunctive relief on behalf of Plaintiffs and the Class for alleged unlawful and deceptive
14 business practices in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*

15 The Settlement provides considerable benefit to Class Members. Settlement Class
16 Members who submit a valid Claim with proof of purchase will be entitled to payment of \$1.25
17 for each box of Near East Products they purchased in California during the Class Period, with no
18 limit. \$1.25 represents more than half of the average purchase price of the Near East Products in
19 California during the Class Period, and likely is equivalent to the maximum restitution that could
20 be awarded at trial. Settlement Class Members who lack proof of purchase can obtain payment of
21 \$1.25 per box for up to six (6) boxes upon filing of a valid Claim. In addition, the Settlement
22 requires Golden Grain to change its packaging to protect consumers going forward from being
23 misled by the size of the Near East Products’ boxes.

24 As discussed below, consideration of the relevant factors demonstrates that the Settlement
25 warrants preliminary approval and the proposed form and method of Class Notice is appropriate.
26 Accordingly, Plaintiffs move the Court to grant preliminary approval of the Settlement, approve
27

28 ¹ The Settlement Agreement and Release (“the Settlement” or the “Settlement Agreement”), including the exhibits thereto, is attached as Exhibit 1 to the Declaration of Kathryn McCauley (“McCauley Decl.”), filed herewith.

1 the proposed form and method of Class Notice, set deadlines for filing Claims and serving
2 objections and requests for exclusion, and schedule a final approval hearing.

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

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

8 Couscous products: Broccoli & Cheese, Mediterranean Curry, Herbed Chicken,
9 Parmesan, Roasted Garlic & Olive Oil Wheat Couscous, Toasted Pine Nut, Wild
10 Mushroom & Herb, Roasted Garlic & Olive Oil Pearled Couscous, and Basil & Herb
11 Pearled Couscous.

12 Rice pilaf products: Original Rice Pilaf, Brown Rice Pilaf, Lentil Rice Pilaf, Chicken
13 Rice Pilaf, Spanish Rice Pilaf, Garlic & Herb Rice Pilaf, Roasted Chicken and Garlic Rice
14 Pilaf, Original Long Grain and Wild Rice, Garlic and Herb Long Grain and Wild Rice,
15 Roasted Vegetable & Chicken Long Grain & Wild Rice, Sesame Ginger Rice, Toasted
16 Almond Rice Pilaf, and Wild Mushroom & Herb Rice Pilaf.

17 Quinoa products: Roasted Red Pepper & Basil, Rosemary & Olive Oil, Zesty Lemon and
18 Mediterranean Medley.

19 Whole grain and tabbouleh products: Roasted Pecan & Garlic and Tabbouleh Mix.

20 (the “Near East Products”). The complaint sought restitution and injunctive relief on behalf of a
21 Class of purchasers of the Near East Products in California since October 28, 2012.

22 On March 1, 2017, Golden Grain demurred. The demurrer was overruled on April 5,
23 2017, and Golden Grain answered the complaint on May 11, 2017.

24 On September 14, 2017, plaintiffs filed an Amended Complaint, adding Brannin, Gomez
25 and Savage as putative class representatives.

26 On October 2, 2017, Plaintiffs filed a motion for certification of the Class, appointment of
27 Brannin, Gomez and Savage as Class Representatives, and appointment of Schubert Jonckheer &
28 Kolbe LLP as Class Counsel. In support of their motion, Plaintiffs submitted the declarations of a
packaging expert, John Caporaso (“Caporaso”), and of a damages expert, Brian Bergmark
 (“Bergmark”). Caporaso subsequently submitted a second declaration, and a third expert, Linda
 V. Young (“Young”), submitted a declaration regarding the plan of notice.

1 After the class certification motion had been briefed, but before the Court’s scheduled
2 hearing on the motion, the Parties attended a full day mediation with Hon. Richard Kramer (ret.)
3 on September 18, 2018, and a second mediation session on September 28, 2018. McCauley
4 Decl., ¶ 18.

5 The Court held two hearings on the motion for class certification: the first was held on
6 November 1, 2018 and the second on January 24, 2019. On January 25, 2019, the Court entered
7 an order granting the motion, appointing Brannin, Gomez and Savage as Class Representatives,
8 and appointing Schubert Jonckheer & Kolbe LLP as Class Counsel (the “Class Certification
9 Order”).

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

12 Following entry of the Class Certification Order, the Parties recommenced extensive
13 arms-length settlement negotiations that they had begun with Judge Kramer’s assistance.
14 McCauley Decl. ¶ 30. Their settlement negotiations continued for many months through the
15 Spring and Summer of 2019, and eventually culminated in the Settlement Agreement presented
16 here. McCauley Decl. ¶ 30 & Exhibit 1.

17 Prior to reaching agreement on the terms of the Settlement, the Parties engaged in
18 substantial discovery related to the motion for class certification as well as the underlying merits
19 of Plaintiffs’ claims. McCauley Decl. ¶ 5, 7-9, 13-15, 20-21. Plaintiffs served Golden Grain with
20 document requests, special and form interrogatories, and requests for admission. McCauley Decl.
21 ¶ 5. Plaintiffs also deposed Golden Grain’s manager in charge of the Near East Products’
22 packaging procedures. McCauley Decl. ¶ 13. In addition, Plaintiffs’ packaging expert, John
23 Caporaso, analyzed the Near East Products’ packaging, including the boxes’ capacities and the
24 extent to which each box was filled, and inspected Golden Grain’s packaging facility in Illinois.
25 McCauley Decl. ¶ 14; *see also* Declaration of John Caporaso in Support of Plaintiffs’ Motion for
26 Class Certification. Plaintiffs’ counsel defended the depositions of the three named Plaintiffs, as
27 well as the depositions of their three experts. McCauley Decl. ¶ 8-9 & 21.

28

1 **III. SETTLEMENT TERMS**

2 The Settlement provides that each Settlement Class Member who submits a valid Claim
3 with proof of purchase is entitled to receive restitution of \$1.25 per box of Near East Products
4 purchased in California during the Class Period. Settlement Agreement ¶ 44. Settlement Class
5 Members who submit valid Claims without any proof of purchase may recover \$1.25 per box for
6 up to six (6) boxes purchased during the Class Period, for total restitution of up to \$7.50.
7 Settlement Agreement ¶ 44. Settlement Class Members may submit a Claim either online or by
8 mailing a completed claim form to the mailing address of the Settlement Administrator.
9 Settlement Agreement ¶ 44. The Claim form is simple and straightforward and may be
10 completed in a few minutes. *See* Settlement Agreement, Exhibit A. Settlement Class Members
11 may upload their proof of purchase if filing a Claim online. *Id.* Settlement Class Members may,
12 alternatively, print copies and mail the Claim Form and any proof of purchase to the Settlement
13 Administrator. Settlement Agreement ¶ 44.

14 In addition to restitution, the Settlement provides for a change in the packaging, to prevent
15 consumers going forward from being misled by the size of the Near East Products' boxes.
16 Specifically, Golden Grain has agreed to change its packaging to include at least one of the
17 following:

- 18 a. A disclosure on the Near East Products boxes, stating as follows: "Package
19 contains empty space to accommodate grain to seasoning ratio. This
20 package is sold by weight, not by volume. Contents may settle during
21 shipping and handling." The Disclosure shall be displayed on the Near
22 East Products' boxes in a prominent manner, including bold, prominent
23 type at least the same font size and type face as "For questions and
24 comments" currently displayed on the Near East Products' boxes.
- 25 b. A line or graphic that represents the product fill line and a statement
26 communicating that the line or graphic represents the product fill line such
27 as "Fill Line," both of which will be clearly and conspicuously depicted on
28 the exterior packaging of the Near East Products, in conformance with Cal.
Bus. & Prof. Code § 12606.2(c)(7)(C).

1 Golden Grain also has agreed to pay Class Counsel’s fees and expenses awarded by the
2 Court not to exceed five hundred thousand dollars (\$500,000.00). Settlement Agreement ¶50
3 These fees and expenses shall include compensation for any work performed by, or costs incurred
4 during, subsequent events in the action, including any appeal or jurisdictional provisions of this
5 Settlement. Settlement Agreement ¶ 50. In addition, Golden Grain has agreed to pay incentive
6 awards ordered by the Court to each of the three Class Representatives of up to five thousand
7 dollars (\$5,000) each. Settlement Agreement ¶ 50.

8 Based upon their experience and an informed evaluation of the Class Members’ claims,
9 including the potential restitution and injunctive relief that could be ordered were this case to
10 proceed to trial, balanced against the substantial risks were the case to proceed to trial, Plaintiffs
11 and Class Counsel determined that the Settlement is fair and reasonable and in the best interests
12 of the Class as a whole. McCauley Decl. ¶ 33-34. Class Counsel considered the benefits
13 afforded by the Settlement as compared to the maximum recovery that could be achieved at trial.
14 *Id.* ¶ 31. The amount available to Settlement Class Members who submit claims with proof of
15 purchase -- \$1.25 per box, with no limit to the number of boxes – is likely equivalent to the
16 maximum amount they could be awarded at trial: that the average purchase price of Near East
17 Products in California during the Class Period was \$2.43 per box² and the empty space in the
18 Near East Products boxes ranged from 41% to 62.5%.³ *Id.* Class Counsel also considered that
19 limiting restitution to those Settlement Class Members who lack any proof of purchase to \$1.25
20 per box for up to six (6) boxes is fair and reasonable, because those Settlement Class Members
21 face the additional risk at trial of being foreclosed from recovering anything due to an absence of
22 proof, and because a cap on recovery for those lacking proof of purchase is a reasonable way to
23 deter fraudulent claims. *Id.* Class Counsel also considered the benefit provided by Golden
24 Grain’s agreement to change its packaging going forward so as to prevent future purchasers from
25 being misled by the size of the Near East boxes. *Id.*

26
27 ² McCauley Decl., Ex. 3, Declaration of Emily Praven in Support of Opposition to Class
28 Certification (“Praven Decl.”), ¶ 7.

³ McCauley Decl., Ex. 2, Declaration of John Caporaso in Support of Plaintiffs’ Motion
for Class Certification (“Caporaso Decl.”), ¶ 19 and Exhibit B.

1 Class Counsel also considered the risks of continued litigation, including the risks of
2 obtaining a smaller recovery after trial and the inevitable appeals, or of obtaining no recovery at
3 all. McCauley Decl. ¶ 32. Class Counsel considered that the state of law regarding slack fill
4 claims is uncertain, and a number of cases have resulted in outright dismissals. *Id.* To the best of
5 Class Counsel’s knowledge, no class action involving slack fill claims has ever been successfully
6 litigated through trial. *Id.* In addition, Class Counsel considered that Golden Grain would
7 undoubtedly have resisted Plaintiffs’ damages models, as was indicated by its opposition to
8 Plaintiffs’ class certification motion. *Id.* Class Counsel also considered Golden Grain’s
9 contention that repeat purchasers could not have suffered any damage as a result of the alleged
10 unlawful business practice, because they would have known how full the boxes were when the
11 purchased the Near East Products for a second time. *Id.* Finally, Class Counsel considered that,
12 were the Settlement not achieved, substantial time could elapse before Plaintiffs and the Class
13 could recover anything from this litigation. *Id.*

14 Defendant denies that it has engaged in any wrongdoing, but agreed to this Settlement
15 because of the substantial expense of litigation, the length of time necessary to resolve the issues
16 presented, the inconvenience involved, and the disruption to its business operations. Settlement
17 Agreement ¶ 13.

18 **IV. THE NOTICE PLAN**

19 The proposed Notice Plan was designed by a highly qualified expert to provide the best
20 notice practicable to the Class, estimated to include over 680,000 members. Finegan Decl. ¶¶ 5-
21 12, 15-19, 23. The Notice employs plain language to inform Class Members about the proposed
22 Settlement, including the Settlement Benefits and prospective requests for attorneys’ fees and
23 expenses and incentive awards; the need to file a Claim to obtain restitution and the deadline for
24 doing so; and their right to opt out or object and the methods by which they can do so, including
25 the deadline for opting out or objecting; and the fact that they will be bound by the Judgment if
26 they do not opt out. *See* McCauley Decl., Exhibit 1, Settlement Agreement, Exhibit B. The
27 Notice also refers Class members to the Settlement Website where they can obtain more details
28 about the case and the Settlement, including by viewing a copy of the full Settlement Agreement

1 and Claim Forms, as well as the operative complaint filed in this case and the Preliminary
2 Approval Order. *Id.*

3 The Notice will be disseminated to the Class through a multi-channel approach. Finegan
4 Decl. ¶¶ 24-34. The proposed Notice Plan includes the following components:

- 5 • Print publication of the Summary Notice (Exhibit C to the Settlement
6 Agreement) once in a California edition of a generally circulated magazine
7 targeted to reach Class Members;
- 8 • Online display banner advertising specifically targeted to reach California
9 Class Members;
- 10 • Keyword Search targeting Class Members;
- 11 • Social media through Facebook, Instagram, Twitter and YouTube targeting
12 California Class Members;
- 13 • A press release across PR Newswire's US1 Newslines;
- 14 • An informational website will be established on which the notices and other
15 important Court documents will be posted; and
- 16 • A toll-free information line will be established by which Class Members can
17 call 24/7 for more information about the Settlement, including, but not limited
18 to, requesting copies of the Long Form Notice or Claim Form.

19 Finegan Decl. ¶ 24-34. The Notice Plan employs best-in-class tools and technology to reach an
20 estimated 77% of the Settlement Class Members on average 3.1 times. *Id.* ¶ 35.

21 **V. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL**

22 **A. LEGAL STANDARD**

23 Any party to a settlement agreement may serve and file a written notice of motion for
24 preliminary approval of the settlement. CRC 3.769(c). At preliminary approval, the Court must
25 consider whether the proposed settlement falls within the “range of reasonableness” to warrant
26 issuance of notice to the class of its terms and conditions, and to schedule a formal fairness
27 hearing. CRC 3.769(c)-(e). In general, the Court has broad powers to determine whether a
28 proposed settlement is fair under the circumstances of the case. The law favors settlement,
particularly in class actions and other complex cases in which substantial resources can be
conserved by avoiding the time, cost, and rigors of formal litigation. *See In re Microsoft I-V
Cases* (2006) 135 Cal.App.4th 706, 723; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794,

1 1800-1801; 4 Newberg on Class Actions (5th ed. 2018), Class Action Settlement, § 13:1
2 (Thompson Reuters) [citing cases].

3 To consider whether a settlement warrants preliminary approval, the Court may consider
4 the same factors that will later be considered at the final fairness hearing. Manual for Complex
5 Litigation (4th ed. 2018) § 21.632 (“The judge must make a preliminary determination on the
6 fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of
7 notice of the certification, proposed settlement, and date of the final fairness hearing”). Relevant
8 factors include:

- 9 • The strength of the plaintiffs’ case;
- 10 • The risk, expense, complexity and likely duration of further litigation;
- 11 • The risk of maintaining class-action status through the trial;
- 12 • The amount offered in settlement;
- 13 • The extent of discovery completed and the stage of the proceedings; and
- 14 • The experience and views of counsel.

15 *Reed v. United Teachers Los Angeles* (2012) 208 Cal.App.4th 322, 336; *Cho v. Seagate Tech.*
16 *Holdings, Inc.* (2009) 177 Cal.App.4th 734, 742-743; *In re Microsoft I-V Cases* 135 Cal.App.4th
17 at 723; *Dunk*, 48 Cal.App.4th at 1800-1801. This list is not exhaustive and should be tailored to
18 each case. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 244-245. The most
19 important factor is the strength of the plaintiffs’ case, balanced against the amount offered in
20 settlement. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.

21 A presumption of fairness applies if the following conditions apply:

- 22 • There has been arms’-length bargaining;
- 23 • Investigation and discovery have been sufficient to allow counsel and the court to act
24 intelligently;
- 25 • Counsel is experienced in similar litigation; and
- 26 • The percentage of class members who object to the settlement is small.

27 *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1146;
28 *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802; *In re Microsoft I-V Cases* (2006) 135
Cal.App.4th 706, 723.

1 **B. CONSIDERATION OF THE RELEVANT FACTORS DEMONSTRATES**
2 **THAT THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL**

3 A proposed settlement is entitled to a presumption of fairness where, as here, the parties
4 with the aid of counsel experienced in class action litigation negotiated the proposed settlement in
5 good faith and at arm's-length after sufficient discovery. *7-Eleven Owners for Fair Franchising*
6 *v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1146; *Dunk*, 48 Cal.App.4th at 1802; *In re*
7 *Microsoft I-V Cases*, 135 Cal.App.4th at 723.

8 The proposed Settlement was the product of prolonged arm's-length bargaining between
9 the parties after substantial discovery of the merits of the case. McCauley Decl. ¶¶ 5, 7-9, 12-14,
10 18, 20-22, 30-34. *See generally Dunk*, 48 Cal. App. 4th at 1799, 1802-03. The parties negotiated
11 this settlement, first, with the assistance of Hon. Richard Kramer (ret.), a highly regarded former
12 Superior Court judge, and later, after class certification had been granted, continued their
13 negotiations over a period of many months. McCauley Decl. ¶¶ 18, 30. Plaintiffs were
14 represented by Schubert Jonckheer & Kolbe LLP, which has considerable experience in litigating
15 complex class actions. McCauley Decl. ¶ 33 & Exhibit 4. Under these circumstances, the
16 Settlement is entitled to a presumption of fairness.

17 Consideration of the relevant factors demonstrates that the Settlement warrants
18 preliminary approval. First, Plaintiffs conducted substantial discovery prior to entering into the
19 Settlement, including substantial written discovery, the deposition of Golden Grain's manager
20 overseeing the packaging of the Near East Products, an inspection of that packaging facility, and
21 the work of three experts. McCauley Decl., ¶¶ 5, 7-9, 12-14, 18, 20-22, 30-34. Each of the Class
22 Representatives actively participated in the litigation, providing Class Counsel with relevant
23 documents and information and staying abreast of developments including settlement
24 negotiations. *Id.* ¶ 34. As a result, prior to agreeing to the Settlement, Plaintiffs and Class
25 Counsel were well-aware of the strengths and weaknesses of this case. McCauley Decl. ¶ 33-34.

26 Second, the benefits achieved by the Settlement are substantial. For those Settlement
27 Class Members who submit proof of purchase with their claims, the Settlement provides
28 restitution that is likely equivalent to the maximum that could be recovered after trial. McCauley
Decl. ¶ 31. And the Settlement also provides substantial restitution to those Settlement Class

1 Members who lack any proof of purchase – allowing them to obtain \$1.25 per box purchased for
2 up to six (6) boxes for a total of \$7.50. *Id.* Further, the Settlement requires that Golden Grain
3 make changes to its packaging to clarify to purchasers that the Near East Products’ boxes are not
4 full, either by adding clarifying language or a fill line, or both. *Id.* As discussed above, these
5 benefits are particularly substantial when weighed against the risks that Plaintiffs faced in proving
6 their claims at trial. *Id.* ¶ 32.

7 While Class Counsel believed that Golden Grain’s arguments would ultimately not have
8 prevailed at trial, they were well-aware that victory was by no means assured, and the risk of
9 adverse judgment or an award of little restitution or none at all was substantial indeed. McCauley
10 Decl. ¶ 32. Based on their experience with other consumer class actions, Plaintiffs’ counsel
11 believe the proposed settlement is fair, adequate, and reasonable. McCauley Decl. ¶ 33.

12 In sum, the benefits achieved through the Settlement weighed against the risks, expense,
13 complexity and likely duration of further litigation demonstrate that the Settlement achieved
14 warrants preliminary approval.

15 **VI. THE PROPOSED FORM AND METHOD OF CLASS NOTICE IS**
16 **APPROPRIATE AND SHOULD BE ORDERED**

17 **A. THE PROPOSED FORM OF NOTICE IS APPROPRIATE AND**
18 **COMPLIES WITH CALIFORNIA LAW**

19 The proposed form of Notice, attached to the Settlement Agreement as Exhibit B,
20 complies with California law and should be approved.

21 The notice must include sufficient information to enable Class Members to assess whether
22 to exclude themselves from the Class. CRC 3.766(d). Accordingly, the notice should include a
23 brief explanation of the case, including the parties’ basic contentions and denials, an explanation
24 as to how to object or exclude themselves, and a statement that they will be bound by the
25 judgment if they remain within the Settlement Class. *Id.*

26 The proposed Notice satisfies the requirements for the form of notice established by
27 California law. It employs plain, simple language to explain the basic allegations made in the
28 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

1 Court. The Notice also provides information regarding how Settlement Class Members can
2 obtain restitution and the deadline for filing Claims, and includes a link to the Claim Form. The
3 Notice also includes an explanation as to how Class Members can opt out of the Settlement Class,
4 including the deadline for doing so, and explains that Class Members will be bound by the
5 Settlement if they do not exclude themselves from the Settlement Class. *See id.* Further, the
6 Notice explains that Settlement Class Members can object to the Settlement, and can but are not
7 required to attend the Final Approval Hearing with or without an attorney to represent them. *See*
8 *id.*

9 The proposed Summary Notice, which is attached as Exhibit C to the Settlement
10 Agreement, directs Class Members to the www.branninsettlement.com website, which will
11 contain the “long-form” Notice, complete Settlement Agreement (including exhibits), the Court’s
12 order granting preliminary approval, and other information. Settlement Agreement, Exhibit C.
13 Accordingly, the proposed Notice complies with the standards of fairness, completeness, and
14 neutrality required of settlement class notices disseminated under authority of the Court.

15 **B. THE PROPOSED MODE OF NOTICE IS APPROPRIATE**

16 The proposed method of Notice, described in the Settlement Agreement ¶ 51 and in the
17 Declaration of Jeanne Finegan, filed herewith, also complies with California law and should be
18 approved.

19 California statutory law vests the Court with broad discretion in fashioning an appropriate
20 notice program. California cases recognize notice to class members should be handled with
21 “pragmatism” and “flexibility” and with due consideration of the economic feasibility of the
22 proposed manner of notice. *Cooper v. Am. Savings* (1976) 55 Cal. App. 3d 274, 285; *Wershba*, 91
23 Cal. App. 4th at 242. The costs of notice must be balanced against the size of the claims.
24 *Cooper*, 55 Cal. App. 3d at 285. A party in a California class action “need only provide
25 meaningful notice in a form that should have a reasonable chance of reaching a substantial
26 percentage of the class members.” *Archibald v. Cinerama Hotels* (1976) 15 Cal.3d 853, 861.
27 Consistent with this pragmatic approach, Rule 3.766(e) provides:

28 In determining the manner of the 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:

If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action—for example, publication in a newspaper or magazine; broadcasting on television, radio, or the Internet; or posting or distribution through a trade or professional association, union, or public interest group.

In this case, the proposed method of Notice is the best method of notice practicable under the circumstances. Finegan Decl. ¶ 35. The size of the class is very large – numbering over 680,000 members – and the individual members’ interests are relatively insubstantial, given that the Near East Products at issue cost, on average, only \$2.43 per box. Finegan Decl. ¶ 23; McCauley Decl. ¶ 31. Consistent with the guidance provided by the Federal Judicial Center, the proposed Notice Plan here employs best-in-class methods to reach a high percentage of the Class Members – 77% -- on average 3.1 times each. Finegan Decl. ¶ 35. As such, the Notice Plan warrants approval. See CRC 3.766(f); *Cooper*, 55 Cal.App.3d at 285 (authorizing notice by publication where “the membership of the class is huge” and potential damages per class member are of limited size); *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960 (reversing order requiring personal notice to 700,000 individuals, reasoning that a less expensive form of notice – notice by publication – would be more appropriate).

VII. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED

The last step in the settlement approval process is the Final Approval Hearing at which the Court will hear all evidence and argument necessary to evaluate the Settlement. At that hearing, proponents of the Settlement may explain and describe its terms and conditions and offer argument in support of final approval. Members of the Settlement Class, or their counsel, may be heard in support of or in opposition to the Settlement. Plaintiffs’ counsel requests that the hearing be held at the earliest date permitted by the terms of the Settlement.

1 The following schedule sets forth a proposed sequence for the relevant dates and
2 deadlines, assuming this Court grants preliminary approval of the proposed Settlement. This
3 sequence is outlined in the proposed Order filed herewith.

- | | | |
|----|---|---|
| 4 | | |
| 5 | a. Dissemination of notice to the Class: | Initiated within seven (7) days of entry of the Preliminary Approval Order and completed within thirty (30) days of commencement. |
| 6 | | |
| 7 | | |
| 8 | b. Deadline for serving and filing Motion for Final Approval of Settlement, for an Award of Attorneys' Fees, Incentive Award and Reimbursement of Expenses. | 45 days after entry of Preliminary Approval Order |
| 9 | | |
| 10 | | |
| 11 | | |
| 12 | c. Deadline to request exclusion from Settlement Class: | 75 days after notice is initiated |
| 13 | | |
| 14 | d. Deadline to serve objections: | 75 days after notice is initiated |
| 15 | e. Deadline to submit claims | 75 days after notice is initiated |
| 16 | f. Deadline for serving and filing any responses to objections: | 89 days after notice is initiated |
| 17 | | |
| 18 | g. Final Approval Hearing on Settlement: | No less than 7 days after submission of any response to objections, i.e., not less than 103 days after entry of Preliminary Approval Order. |
| 19 | | |
| 20 | | |

21 **VIII. CONCLUSION**

22 For all of the foregoing reasons, Plaintiffs respectfully request that this Court grant
23 preliminary approval to the proposed Settlement, approve the proposed form and method of Class
24 Notice, set the deadlines for objecting to and opting out of the Settlement, and schedule a Final
25 Approval Hearing.

26
27 DATED: December 17, 2019

SCHUBERT JONCKHEER & KOLBE LLP

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/s/ Kathryn McCauley
Robert C. Schubert
Miranda P. Kolbe

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