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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

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

Date: May 8, 2020
Time: 1:30 p.m.
Dept: 303
**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”) submit this supplemental memorandum in support of their continued motion for
4 preliminary approval of their Settlement¹ with defendant Golden Grain Company. In this
5 memorandum, Plaintiffs address the issues raised by the Court in its tentative ruling dated March
6 18, 2020, and to apprise the Court of the status of one of the named Plaintiffs, Phyllis Brannin.

7
8 **II. RELIEF PROVIDED TO THE CLASS**

9 **A. MAXIMUM POTENTIAL RECOVERY AT TRIAL COMPARED TO
10 MONETARY RELIEF PROVIDED THROUGH SETTLEMENT**

11 In its tentative ruling, the Court asked Plaintiffs to address the merits of the Settlement, as
12 compared to the total recovery that could be awarded at trial. There were approximately 36.5
13 million boxes of Near East Products sold during the Class Period. Declaration of Daniel Tinney
14 (“Tinney Decl.”) ¶ 5. Based upon this, Plaintiffs’ estimate of maximum damages ranging
15 between \$0.53 and \$1.18 per box,² the maximum common fund could range from \$19 to \$43
16 million. Awarded attorneys’ fees and costs and incentive awards, as well as the costs of
17 distributing payments, would be subtracted from this amount before payments could be allocated
18 to the Class.

19 To obtain any direct benefit, Class members would have to participate in a claims
20 procedure. The form of that procedure, and the proof required of Class members to obtain
21 payment through it, would fall within the Court’s broad discretion. For Class Members with
22 receipts or other documentation of their purchases, it is doubtful that any post-trial procedure
23 would be easier than the procedure proposed here, and, given that damages are estimated at less
24 than \$1.25 per box, could result in less compensation than \$1.25 per box. Whether the remaining
25 Class members, who lack documentation of their purchases, would be able to satisfy the standard

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

² See Memorandum of Points and Authorities in Support of Renewed Motion for
Preliminary Approval of Class Action Settlement and Approval of Class Notice, filed on March
9, 2020, at pp. 8-9.

1 of proof required to establish Class membership and entitlement to relief is unclear, as is whether
2 they would be able to recover more than \$7.50 per household after trial.³

3 Of course, if a common fund were established through trial, the Class could obtain
4 additional, *indirect* benefits in addition to claiming individual compensation.⁴ For example, the
5 unclaimed portion of a common fund could be awarded to a *cy pres* recipient with a mission
6 aligned with the interests of the Class, or could be indirectly “paid” through court-ordered price
7 reductions going forward. *See California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 472; *Daar*
8 *v. Yellow Cab* (1967) 67 Cal.2d 695 (approving settlement providing for reduction in prices).

9 The potential of obtaining such indirect benefits, however, does not render the proposed
10 Settlement inadequate or unreasonable. At this juncture in the litigation, the direct monetary
11 benefits that are available to all Class members who submit valid Claims provide substantial
12 relief while avoiding the significant risks that the Class would face – potential decertification, an
13 adverse verdict, or a lowered damage award -- were this case to proceed to trial. Per the Court’s
14 request, Plaintiffs will not reiterate those risks here. Plaintiffs believe the monetary benefits
15 provided by this Settlement are reasonable, and weigh in favor of its preliminary approval.

16
17
18 ³ There is a dearth of case law regarding the proof required for class members to obtain
19 payment from a common fund established at trial in the context of a case such as this one, where
20 the Parties lack a class list. However, in the settlement context, courts have exercised broad
21 discretion to limit monetary relief provided to those without documentation supporting their
22 claims of class membership and entitlement to relief. *See, e.g., Broomfield v. Craft Brew*
23 *Alliance* (N.D.Cal. Feb. 5, 2020) 2020 U.S.Dist.LEXIS 74801, at *27 (finally approving
24 settlement allowing class members without proof of purchase to claim up to \$10, and class
25 members with proof of purchase to claim up to \$20); *Fitzhenry-Russell v. Coca-Cola Co.* (N.D.
26 Cal. June 13, 2019, NO. 5:17-cv-00603-EJD) 2019 U.S.Dist.LEXIS 200701, at *7-8
27 (preliminarily approving settlement allowing claims without proof of purchase of up to \$10.30
and with proof of purchase of up to \$80); *Cowen v. Lenny & Larry's, Inc.* (N.D.Ill. Nov. 1, 2018)
2018 U.S.Dist.LEXIS 221810, at *10-11 (preliminarily approving settlement allowing class
members without proof of class membership or purchase to claim \$10 cash and those with proof
of purchase to claim up to \$50); *In re Packaged Ice Antitrust Litig.* (E.D.Mich. 2017) 322 F.R.D.
276, 289 (finally approving settlement allowing class members without proof of purchase to
claim up to \$12 and those with proof of purchase to claim up to \$24); *Miller v. Ghirardelli*
Chocolate Co. (N.D.Cal. Feb. 20, 2015, No. 12-cv-04936-LB) 2015 U.S.Dist.LEXIS 20725, at
*3-4 (finally approving settlement limiting claims without proof of purchase to \$24 per household
and allowing unlimited claims for those with proof of purchase).

28 ⁴ *See, e.g., Fitzhenry-Russell*, 2019 U.S.Dist.LEXIS 200701, at *7-8 (“even if Plaintiffs
won at trial, class members would still need to make claims in order to receive compensation as
Defendant has no records of individual purchases”).

1 **B. INJUNCTIVE RELIEF**

2 In its tentative order, the Court also asked the Parties to confirm whether any material
3 change had been made in the packaging, so as to excuse Golden Grain from compliance with the
4 proposed injunction. As explained in the Tinney Decl., filed herewith, Golden Grain has
5 confirmed that no material change has been made to the packaging so as to excuse Golden Grain
6 from compliance with the injunction. Tinney Decl. ¶ 6.

7
8 **III. CLAIMS PROCEDURE**

9 The Court has also asked the parties to address whether it would be appropriate to permit
10 rejected Claimants to appeal that decision to the Court. The Parties have no objection to this
11 proposal. Accordingly, the Settlement Administrator has proposed the following procedure to
12 enable Claimants to dispute any decision by the Claims Administrator rejecting their claim.
13 Declaration of James R. Prutsman Concerning Claims Procedure (“Prutsman Decl”). First, within
14 ten (10) days of the close of the Claims Period, the Claims Administrator will contact those Class
15 members with rejected Claims, notifying them of the basis for its decision and providing them
16 with an opportunity to cure any defects in their claim through a simple, online procedure. *Id.* ¶ 5.
17 Claimants will be given two weeks to dispute or cure the basis for the Claims Administrator’s
18 decision. *Id.* After receipt of any disputes, the Settlement Administrator may reverse its initial
19 decision rejecting some or all of the disputed, rejected claims, as can counsel for the Parties, by
20 mutual decision. *Id.* ¶ 6. Finally, Settlement Class Members who submitted any remaining,
21 disputed claims will be provided an opportunity to escalate their dispute to the Court. *Id.* The
22 Settlement Administrator will file all documents submitted in conjunction with any escalated
23 Claims in advance of the Court’s Final Approval Hearing. *Id.* The parties agree that the Court
24 may, in its discretion, resolve any escalated Claims.

25
26 **IV. LANGUAGE(S) IN WHICH NOTICE WILL BE PROVIDED**

27 The Court asked the Parties to clarify data previously provided related to whether Notice
28 should be provided in any language other than English or Spanish. In her declaration filed in
conjunction with this Supplemental Memorandum, Jeanne Finegan clarified that virtually all

1 California households that consume Near East Products – 99.47% -- speak English as a primary
2 or secondary language. Declaration of Jeanne Finegan (“Finegan Decl.”) ¶ 6. Finegan
3 accordingly has opined that Notice in both English and Spanish would be sufficient. *Id.*

4 To further clarify data previously provided to this Court, Finegan has explained that the
5 MRI data previously provided to the Court regarding the racial/ethnic makeup of the Class did not
6 classify Class members as falling within only one ethnic or racial category. Finegan Decl. ¶ 5.
7 Thus, for example, a Class member could be both Caucasian and Hispanic. *Id.*

8 9 **V. LONG FORM NOTICE**

10 The Parties have adopted the Court’s suggested changes to the Long Form Notice. *See*
11 Kolbe Decl., Ex. 1, Second Amended Settlement Agreement, at Ex. B, Long Form Notice.

12 13 **VI. SOCIAL MEDIA POSTINGS**

14 The parties have submitted exemplars of the publications and social media postings that
15 will be used by the Notice Provider in this case. Finegan Decl., Ex. A. The publication notice
16 conforms to the “short form” notice that the Parties have previously presented to the Court, and
17 the social media postings clearly and directly alert Class Members, so that they may obtain more
18 information at the Settlement Website.

19 20 **VII. SETTLEMENT WEBSITE**

21 The Claims Administrator has confirmed that the Settlement Website will include Notice
22 in both Spanish and English, Claim Forms, all orders, including tentative rulings, entered in
23 conjunction with the Preliminary Approval motion, as well as any and all other material ordered
24 by the Court to be posted. Prutsman Decl. ¶ 8.

25 26 **VIII. RELEASE**

27 In its Tentative Ruling, the Court posited certain changes to the Release. The Parties have
28 revised the “Release of Claims” language to state as follows:

1 Release of Claims. Upon the Effective Date, the Parties and each Settlement Class
2 Member and their respective agents, successors, heirs or assigns, shall be deemed to have,
3 and by operation of the Final Judgment and Approval Order, shall have fully, finally, and
4 forever irrevocably released, relinquished and discharged with prejudice all debts, claims,
5 obligations, damages, liabilities, demands, costs, expenses (including attorneys' fees),
6 indebtedness and causes of action of every kind and nature whatsoever, whether now
7 known or unknown, suspected or unsuspected, fixed, conditional or contingent, which
8 they ever had, may now have, or may hereafter have, against each other for any injury,
9 damage, loss or expense, arising or accruing from the claims that have been made in this
10 Litigation or that could have been asserted based on the facts alleged in this Litigation at
11 any time up until the date of the Preliminary Approval Order.

12 Kolbe Decl., Ex. 1, Second Amended Settlement Agreement ¶ 55.

13
14 **IX. STATUS OF NAMED PLAINTIFF**

15 Plaintiffs seek to apprise the Court that Plaintiffs' counsel has been unable to contact one
16 of the named Plaintiffs, Phyllis Brannin, despite making substantial efforts to reach her over the
17 past few months, including by certified mail. Kolbe Decl. ¶ 3. Plaintiffs' counsel was informed
18 that Ms. Brannin is deceased, but has not yet been able to obtain confirmation from a coroner's
19 office or other official record. *Id.* The Parties have discussed the matter and propose that, if
20 preliminary approval is granted, Plaintiffs' counsel will continue their efforts to locate Ms.
21 Brannin and will apprise the Court of the results of their efforts contacting Ms. Brannin or her
22 next of kin in advance of seeking Final Approval of the Settlement.

23
24 **X. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED**

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

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

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- a. Dissemination of notice to the Class: Initiated thirty (30) days from entry of the Preliminary Approval Order and completed within sixty (60) days of Preliminary Approval
- b. Deadline to request exclusion from Settlement Class: 45 days after dissemination of notice is completed
- c. Deadline to serve objections: 45 days after dissemination of notice is completed
- d. Deadline to submit claims: 45 days after dissemination of notice is completed
- e. Notification to Claimants of Opportunity to Contest or Cure Rejected Claims: 10 days after deadline to submit claims
- f. Deadline to dispute or cure rejected Claims: 14 days after notification of opportunity to contest or cure
- g. Settlement Administrator notifies any remaining Claimants with disputed, rejected claims of opportunity to escalate dispute to the Court: 5 days after deadline to dispute or cure rejected Claims
- h. Any remaining Claimants with disputed, rejected claims may escalate dispute to Court: 7 days after notification of opportunity to escalate dispute
- i. Deadline for serving and filing Motion for Final Approval of Settlement, Attorneys' Fees and Expenses, and Incentive Awards, including information regarding Claims made and rejected, as well as any rejected Claims escalated for resolution by the Court, objections and requests for exclusion: 7 days after deadline to escalate dispute to Court
- j. Final approval hearing: No earlier than 7 days from deadline to file Motion for Final Approval

1 **XI. CONCLUSION**

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

6
7 DATED: May 4, 2020

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