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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RENEE YOUNG and JOYCETTE GOODWIN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NEUROBRANDS, LLC, a Delaware limited liability company;

Defendant.

Case No. 4:18-cv-05907-JSW

CLASS ACTION

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: June 25, 2021
Time: 9:00 a.m.
Ctrm: 5
Judge: Hon. Jeffrey S. White

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I. SUMMARY OF THE ARGUMENT

This settlement provides significant injunctive relief in a certified consumer protection class action involving beverage products sold under the Neurobrands brand (the "Products"). The Neurobrands beverage Products at issue are labeled as containing "no artificial colors or flavors" and "natural flavors". Plaintiffs allege that such labeling claims are false and misleading because the Products allegedly contain an artificial flavoring ingredient called dl-malic acid. (*See generally* First Amended Complaint ("FAC"), Dkt. No. 18). Defendant vigorously denies these allegations and that its labeling is in any way false or misleading.

After hard-fought settlement negotiations, which included a full-day mediation and several additional telephonic sessions with a neutral mediator, the Honorable Judge Jay C. Gandhi (Ret.) of JAMS, the Parties reached this proposed settlement. There can be no doubt that the terms of this settlement accomplish the goals of this litigation. As further discussed below, the terms of this settlement require Defendant to use its best efforts to reformulate all Products that contain DL-malic acid by removing DL-malic acid as an ingredient. If after using its best efforts, Defendant determines that one or more of the reformulated Products are not scientifically or commercially feasible, Defendant is required to modify its packaging, labeling and advertising for the Products by (1) removing the phrase "or flavors" from the phrase "no artificial colors or flavors" on the Neurobrands Product packaging and promotional materials, (2) identifying "DL-malic acid" in the ingredient list of the Product packaging and promotional materials, (3) modifying the Neurobrands website to disclose the use of synthetic malic acid, and (4) adding an asterisk or similar reference to the Product labels directing consumers to the statement "*Learn More at [the URL or webpage of the Neurobrands website]" containing the disclosure of synthetic malic acid. All labeling modifications are permanent, unless and until Defendant changes its product formulation to remove dl-malic acid from the Products. The value of this injunctive relief cannot be underestimated. *See Littlejohn v. Defendant Beverage Company,* 819 Fed.App'x. 491, 493-94 (9th Cir. 2020) (affirming final approval of class action settlement where defendant agreed to remove the phrase "no artificial flavors" from product packaging and identify "dl-malic acid" as an ingredient; finding "the district court reasonably concluded that the Settlement's injunctive relief

provided value to the class"); *Carr v. Tadin*, *Inc.*, No.12-CV-3040 JLS (JMA), 2014 WL 7497152, at *4 (S.D. Cal. Apr. 18, 2014) (granting preliminary approval where "the injunctive relief Defendant has agreed to provide– modifying the labeling and packaging of the Products– is the primary relief Plaintiffs sought in their complaint."). For the reasons set forth below, this settlement is fair, reasonable, and adequate and should be approved by the Court.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this class action on September 26, 2018 against Neurobrands, LLC regarding allegedly deceptive advertising of the Neurobrands beverage products. (Dkt. No. 1). On December 17, 2018, Plaintiffs filed a First Amended Complaint bringing claims for violations of California's Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq*. ("CLRA"), California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. ("UCL"), California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq*. ("FAL"), and causes of action for fraud by omission, negligent misrepresentation, and breach of express and implied warranties. (Dkt. No. 18). The gravamen of Plaintiffs' FAC is that the Neurobrands beverage products contain an artificial flavoring ingredient called dl malic acid despite Defendant's representations that the Products are made with "no artificial [] flavors." (FAC ¶¶ 16-46).

On January 14, 2019, Defendant filed a Motion to Dismiss Plaintiffs' First Amended Complaint. (Dkt. No. 29). Plaintiffs opposed the motion on January 28, 2019, and Defendant filed a reply brief on February 4, 2019. (Dkt. Nos. 33-34). On February 19, 2019, the Court denied Defendant's Motion to Dismiss in its entirety. (Dkt. No. 37).

Shortly thereafter, the Parties engaged in substantial and extensive discovery, including written discovery, depositions, third-party discovery, and hiring of experts. Specifically, on February 22, 2019, Plaintiffs served requests for production of documents and interrogatories on Defendant. *See* Declaration of Ronald A. Marron in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement ("Marron Decl."), at ¶ 4. Plaintiffs also propounded requests for admission on October 8, 2019, and a second set of requests for production of documents on February 11, 2020. *See id*. Defendant produced, and Plaintiffs reviewed, several hundreds of documents in response to Plaintiffs' document requests. *See id*. On August 29, 2019,

Plaintiffs' counsel took the deposition of Defendant's Chief Science & Regulatory Officer and 30(b)(6) witness, Christopher Noonan; on November 19, 2019, Plaintiffs' counsel took the deposition of Defendant's Director of Operations, Reza Mazloumi; and on October 22, 2019, Plaintiffs' counsel took the deposition of Adirondack Beverages Co.'s person most knowledgeable, Erina Jess. *See id*., ¶ 5. Plaintiffs' counsel also subpoenaed, received, and reviewed several hundred documents from Defendant's co-packers Adirondack Beverages Co. and Unix Packaging, Inc. *See id*. Plaintiffs also served requests for admissions to authenticate documents produced by Defendant during discovery on March 2, 2021 in preparation for trial. *See* Marron Decl., ¶ 4.

On July 26, 2019, Defendant served requests for production of documents and interrogatories on each Plaintiff. *See* Marron Decl., ¶ 6. Defendant took the deposition of Plaintiff Joycette Goodwin on September 24, 2019, and the deposition of Renee Young on September 27, 2019. *See id*. The Parties each consulted with and retained experts regarding dl-malic acid and the function of this ingredient in the Products. Plaintiffs disclosed the expert report of Dr. Laszlo D. Somogyi on January 17, 2020, and Defendant disclosed the rebuttal expert report of Dr. Lawrence Hawley on March 5, 2020. *Id*. Both Parties served deposition subpoenas on the other party's expert, though neither deposition ultimately took place in light of the Settlement. *See id*.

On October 4, 2019, Plaintiffs filed a motion for class certification seeking Rule 23(b)(2) certification of a Nationwide class and California sub-class. (Dkt. No. 43). On October 15, 2020, the Court granted in part and denied in part Plaintiffs' Motion for Class Certification and certified, pursuant to Fed. R. Civ. P. 23(b)(2), a class of California consumers defined as:

> All California citizens who made retail purchases of one of the following Products labeled as containing "natural flavors" and "no artificial colors or flavors" in California on or after January 1, 2012 through October 15, 2020, for personal use and not for resale, excluding Defendant and Defendant's officers, directors, employees, agents and affiliates, and the Court and its staff:
>
> - NeuroSONIC Superfruit Infusion
> - NeuroSONIC Orange Passion;
> - NeuroBLISS White Raspberry;
> - NeuroBLISS Citrus Berry;

- NeuroBLISS Tropical Lychee;
- Neuro[PROTEIN] Watermelon Min[t];
- NeuroPROTEIN Cherry Vanilla;
- NeuroDAILY Tangerine Citrus; and
- NeuroGASM Passion Fruit.

(*See* Dkt. No. 72). Additionally, the Court appointed Plaintiffs Renee Young and Joycette Goodwin as class representatives and appointed the Law Offices of Ronald A. Marron as class counsel. *Id*.

Following the Court's Order regarding Class Certification, the Parties scheduled a full day mediation session before the Honorable Judge Jay C. Gandhi (Ret.) of JAMS. *See* Marron Decl., ¶ 10. Before the mediation, the Parties exchanged detailed mediation briefs setting forth their respective positions. *Ibid*. Because of this mutual exchange of arguments and information and due to the extensive discovery already performed in the case, the Parties were fully prepared and informed to participate in the mediation. *Ibid*. On February 2, 2021, the Parties attended their full-day mediation session before Judge Gandhi, where they agreed in principle to certain terms of an injunctive relief class action settlement. *See* Marron Decl., ¶ 11. Following the first mediation session, the Parties participated in further telephonic sessions with Judge Gandhi and engaged in extensive negotiations to finalize the text of the Settlement Agreement themselves, as well as a notice plan and proposed order for the Court. *Ibid*. Over the course of several months following the mediation, the Parties diligently negotiated and drafted a formal Settlement Agreement for which the Parties now seek preliminary approval. Marron Decl., ¶ 2 & Ex. 1 ("Settlement Agreement" or "Agreement").

The Settlement Agreement is the product of vigorous, adversarial, and competent representation of the Parties and substantive negotiations throughout the pendency of this litigation. *See* Marron Decl. ¶ 12. Plaintiffs' counsel exercised due diligence to confirm the adequacy, reasonableness, and fairness of the settlement, both before and after mediation. *Ibid*. Plaintiffs' counsel also conducted a detailed and comprehensive review of the FDA's labeling regulations and their applicability to the Products' labeling claims at issue here and the California

Sherman Food, Drug and Cosmetic Law (Cal. Health & Safety Code §§ 109875, *et seq.*, "Sherman Law"). *Ibid*. Plaintiffs' counsel was aware of the attendant strengths, risks, and uncertainties of Plaintiffs' claims, and Defendant's defenses, during the course of negotiations. *Ibid*. Defendant, throughout the course of the litigation, has vigorously denied any wrongdoing or liability, and contends that it would be wholly successful in defeating Plaintiffs' claims at or before trial. At trial or before, Defendant would argue that the Products are properly labeled and that its labeling and marketing is not false or misleading.

Despite the vigorous opposition on both sides, the Parties appreciate the costs and uncertainty attendant to any litigation, and have agreed to a proposed settlement agreement. Plaintiffs' counsel agreed to settle the action pursuant to the provisions of the Settlement, after considering, among other things: (i) the substantial benefits to Plaintiffs and the Class under the terms of the Settlement; (ii) the uncertainty of being able to prevail at trial; (iii) the uncertainty relating to Defendant's defenses and the expense of additional motion practice in connection therewith; (iv) the attendant risks, difficulties and delays inherent in litigation, especially in complex actions such as this; and (v) the desirability of consummating this Settlement promptly in order to provide substantive relief to Plaintiffs and the Class without unnecessary delay and expense. Marron Decl. ¶ 13. Defendant has agreed that Plaintiffs' FAC was brought in good faith, was not frivolous, and is being settled on a voluntary basis. *See* Agreement § 11.3.

III. SUMMARY OF THE PROPOSED SETTLEMENT

The following is a summary of the material terms of the proposed Settlement, attached as Exhibit 1 to the concurrently filed Declaration of Ronald A. Marron.

1. The Settlement Class

The proposed settlement establishes a Settlement Class, pursuant to Fed. R. Civ. P. 23(b)(2), identical to the class that was certified in the Court's October 15, 2020 order granting in part Plaintiffs' Motion for Class Certification:

> All California citizens who made retail purchases of one of the following Products labeled as containing "natural flavors" and "no artificial colors or flavors" in California on or after January 1, 2012 through October 15, 2020, for personal use and not for resale, excluding Defendant and Defendant's officers, directors, employees, agents and affiliates, and the

Court and its staff:

- NeuroSONIC Superfruit Infusion
- NeuroSONIC Orange Passion;
- NeuroBLISS White Raspberry;
- NeuroBLISS Citrus Berry;
- NeuroBLISS Tropical Lychee;
- NeuroPROTEIN Watermelon Mint;
- NeuroPROTEIN Cherry Vanilla;
- NeuroDAILY Tangerine Citrus; and
- NeuroGASM Passion Fruit.

See Dkt. No. 72; *see also* Agreement at § 1.2.

2. Settlement Consideration

Defendant has agreed to provide injunctive relief by reformulating the Products and/or modifying its Products' labels. *See* Agreement §§ 4.1-4.3. Specifically, Defendant will use its best efforts to reformulate all Products that contain DL-malic acid by removing DL-malic acid as an ingredient. Agreement § 4.1.1. Defendant will perform Product reformulation research and development and testing, which must be completed within seven months of the date the Court issues a Preliminary Approval Order. *See* Agreement § 4.1.2 – 4.1.3. If the new formulations pass requisite testing and are commercially feasible, Defendant will begin switching to the new formulations within 30 days of the completion of such testing. *See id*., §§ 4.1.4.[1] Defendant must provide a declaration to Class Counsel confirming that best efforts were used. *See id*., § 4.1.5.

If after using best efforts Defendant determines that one or more of the reformulated Products are not scientifically or commercially feasible, Defendant agrees to modify its packaging, labeling and advertising for all such Products containing dl-malic acid. Specifically, within 30 days of determining that one or more of the reformulated Products are not scientifically or commercially feasible, Defendant agrees to (1) add "(DL-malic acid)" after "malic acid" in the ingredient list of all such Products that contain dl-malic acid as an ingredient; (2) replace the phrase

[1] Defendant and third parties will be permitted to distribute and sell residual Products manufactured prior to the implementation of the reformulations. *See* Agreement § 4.1.4.

"no artificial colors or flavors" with "no artificial colors" from the labeling and advertising of all such Products that contain dl-malic acid as an ingredient; (3) modify its website to disclose that the Products may also contain synthetic malic acid or other acidulants; and (4) add an asterisk or similar reference after or adjacent to the "natural flavors" representation on the top front of each such Product label, which directs the consumer to the statement "*Learn More at [the URL or webpage of the Neurobrands website] containing the disclosure described in (3). *See* Agreement § 4.2 – 4.2.4.[2] All such labeling modifications are permanent, unless and until Defendant changes its product formulation to remove all dl-malic acid from the Products. *See id*., § 4.3.

3. The Notice Program and Settlement Administration[3]

Pending this Court's approval, Kroll Settlement Administration will serve as the Notice Administrator, and will be responsible for administrating the Notice Program. Agreement at § 1.15. The Notice Program consists of four different components: (1) Online Notice through a settlement website, (2) Social Media Notice, (3) Print Publication Notice, and (4) CAFA Notice. *See* Agreement at Ex. C. The forms of the proposed Notices, agreed upon by Class Counsel and Defendant, subject to this Court's approval and/or modification, are attached to the Settlement Agreement as Exhibits A & B. The Notice Administrator will also establish a settlement website that will be located at www.NeurobrandsClassAction.com. Agreement § 5.6.1. The notices include at least the following information: (1) contact information for class counsel to answer questions; (2) the address for a website, maintained by the claims administrator or class counsel, and (3) instructions on how to access the case docket via PACER or in person at any of the court's locations. *See* Agreement at Exs. A & B.

The Notice program is designed to provide the Settlement Class with important information regarding the Settlement and their rights thereunder, including a description of the material terms of the Settlement; a date by which Class Members may object to the Settlement, Class Counsel's

[2] Defendant and third parties will be permitted to distribute and sell residual Products manufactured prior to the implementation of the labeling changes. *See* Agreement § 4.2.5.

[3] Notice under Rule 23(b)(2) is discretionary and not typically required. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011).

fee application and/or the request for Incentive Awards; the date of the Final Approval Hearing; information regarding the Settlement Website where Class members may access the Agreement, and other important documents.

4. The Right to Object[4]

Class Members who wish to file an objection to the Settlement must do so no later than 30 days prior to the Final Approval Hearing. Agreement at § 7.5.1. Objections must be in writing and class members who wish to object to the settlement must send their written objections to the Court. *See id*. Any objection must contain a caption or title that identifies it as "Objection to Class Settlement in *Young v. Neurobrands, LLC*, Case No. 4:18-cv-05907-JSW" and also shall contain information sufficient to identify and contact the objecting Class Member (or his or her attorney, if any), as well as a clear and concise statement of the Class Member's objection, documents sufficient to establish the basis for their standing as a Class Member, i.e., verification under oath as to the approximate date(s) and location(s) of their purchase(s) of the Products, the facts supporting the objection, and the legal grounds on which the objection is based. Agreement at § 7.5.3.

5. Release of Claims

In exchange for the settlement consideration, Plaintiffs, themselves, will agree to release all Released Persons from all claims and damages, including injunctive relief and monetary relief, that they have or might have against Defendant as of the date of the Settlement Agreement. Agreement at § 6.1. Class Members will agree only to release the Released Persons from claims for injunctive relief that were or reasonably could have been asserted based on the factual allegations in this Litigation. *See id*., § 6.2. The Class Members' release specifically excludes potential claims for monetary damages of any kind and expressly do not include any personal injury claims regarding the Products. *See id*. The Released Persons are defined in Section 1.22 of the Settlement Agreement.

[4] Members of a Rule 23(b)(2) class do not have the right to opt-out. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994).

6. Class Counsel's Fees and Expenses and Plaintiffs' Incentive Award

Defendant has agreed to pay Plaintiffs' attorney's fees and costs in an amount not to exceed $750,000, subject to Court approval. Agreement § 8.1. Defendant has also agreed to pay for the costs of notice to the Settlement Class, comprising of a broad range of notice through multiple publications in print and online media. *See* Agreement at Ex. C. Notice and administration will cost approximately $20,000. *See* Agreement § 5.1 & Ex. C. Defendant will also pay an incentive award to Plaintiff Goodwin not to exceed $5,000 and an incentive award to Plaintiff Young not to exceed $5,000, as a service payment for their efforts in seeing that this case was brought, litigated, and resulted in substantive product reformulations or labeling changes on behalf of the public. *See* Agreement at § 8.1. Defendant shall bear its own attorney's fees, costs and expenses. *Id*. § 8.3.

IV. LEGAL STANDARD FOR PRELIMINARY APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure requires a preliminary evaluation of a proposed class action settlement, the first step in a three-stage process. At this stage, the Court must initially determine whether it "will likely be able to" (i) approve the settlement as fair, reasonable, and adequate; and (ii) "certify the class for purposes of judgment on the proposal."[5] Fed. R. Civ. P. 23(e)(1)(B). Then, after potential class members are given notice and an opportunity to object, the Court must hold a hearing to consider whether to approve the settlement and certify the settlement classes. *See* Fed. R. Civ. P. 23(e)(2).

Federal Rule of Civil Procedure 23(e) provides that the Court may approve a class action settlement "only after a hearing and only on a finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

[5] Nothing has changed since the Court certified the Class on October 15, 2020. *See* Dkt. No. 72 [Order on Motion for Class Certification]; *see also* Section III(1), *supra*. Accordingly, and for brevity, Plaintiff relies on the Court's original findings in certifying the Class following contested class certification briefing. *Id.*

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other."

Fed. R. Civ. P. 23(e)(2); *see also* Procedural Guidance for Class Action Settlements, Preliminary Approval ("Procedural Guidance") (instructing parties to submit specific information to the Northern District of California).

V. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

1. Plaintiffs and Class Counsel Have Adequately Represented the Class

Rule 23(e)(2)(A) requires the Court to consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). A determination of adequacy of representation requires that "two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000), *as amended* (June 19, 2000) (citing *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir. 1998))); *see also Hefler v. Wells Fargo & Co*., 2018 WL 6619983, at *6 (N.D. Cal. 2018).

Renee Young and Joycette Goodwin, the Court appointed Class Representatives (Dkt. No. X), have no conflicts of interest with other class members and each have prosecuted this action diligently on behalf of the Class. *See* Declaration of Renee Young, filed concurrently herewith ("Young Decl."), at ¶ 9; *see* Declaration of Joycette Goodwin, filed concurrently herewith ("Goodwin Decl."), at ¶ 9; *see also* [Order on Motion for Class Cert]. This includes sitting for tough depositions, reviewing material filings and submitting declarations, and consulting with counsel on other discovery issues. Both Class Representatives were fully prepared to testify at trial, have kept themselves informed about the status of the proceedings, and are dedicated to

vigorously pursuing this action on behalf of the Certified Class. Accordingly, the named Plaintiffs have adequately represented the Class.

Class Counsel have also vigorously represented the Class and have no conflicts of interest. The Settlement was negotiated by counsel with extensive experience in consumer class action litigation. *See* Marron Decl., ¶ 20 & Ex. 2 (firm resume of Law Offices of Ronald A. Marron). Through the discovery process, Class Counsel obtained sufficient information and documents to evaluate the strengths and weaknesses of the case. Marron Decl., ¶ 8; *see also Final approval criteria—Rule 23(e)(2)(A): Adequate representation*, 4 NEWBERG ON CLASS ACTIONS § 13:49 (5th ed.) ("if extensive discovery has been done, a court may assume that the parties have a good understanding of the strengths and weaknesses of their respective cases and hence that the settlement's value is based upon such adequate information."). Based on such discovery and their experience, Class Counsel believe that the Settlement provides exceptional results for the class while sparing the class from the uncertainties of continued and protracted litigation. Marron Decl., ¶ 15. *See, e.g., In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness."); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 976 (9th Cir. 2009) (Deference to Class Counsel's evaluation of the Settlement is appropriate because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation."). Adequacy of representation is satisfied.

2. The Settlement was Negotiated at Arm's Length

Rule 23(e)(2)(B) requires the Court to consider whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Here, the settlement was reached after informed, arm's length negotiations after hard-fought litigation and discovery. The Parties did not settle until after the Court had entered an Order on Plaintiffs' Motion for Class Certification and after the Parties exchanged mediation briefs. Marron Decl., ¶ 10. Settlement discussions also did not begin until after the Parties had exchanged written discovery and documents, which speaks to the fundamental fairness of the process. *See Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("A settlement following sufficient discovery and genuine arms-length

negotiation is presumed fair."). After motion practice and significant discovery efforts, the Parties retained JAMS mediator Judge Jay C. Gandhi (Ret.) for a private mediation session, with extensive follow-up negotiations. The time that it took to work out significant details and vigorous disagreements between the Parties and the Parties' need for additional telephonic sessions with Judge Gandhi demonstrate that this proposed resolution was the product of heavily disputed and arm's length negotiation (Marron Decl., ¶¶ 10-13) and the involvement of this highly experienced mediator supports a finding that the Settlement is not the product of collusion. *See Harris v. Vector Mktg. Corp.*, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) (finding that involvement of a mediator suggested the settlement "was not the result of collusion of bad faith by the parties or counsel"). Further, the Settlement itself bears none of the traditional signs of collusion. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-48 (9th Cir. 2011).

In short, Plaintiffs possessed a wealth of information before engaging in settlement negotiations and both Parties and their counsel were thoroughly familiar with the applicable facts, legal theories, and defenses on both sides. Marron Decl., ¶ 12. Based on this knowledge and their experience litigating and settling class actions, Class Counsel believe that the Settlement is fair, reasonable, and adequate. Marron Decl., ¶ 14. *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.") (citation omitted). Therefore, this Court may presume that the settlement is fundamentally fair and was negotiated at arm's length by competent counsel who are experienced in class action litigation.

3. The Settlement Provides Meaningful Relief to the Class

Rule 23(e)(2)(C) requires that the Court consider whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C). "Before the Rule arrives at the articulation of sub-factors, its general directive asks whether the class's relief is adequate." *Final approval criteria—Rule 23(e)(2)(C): Adequate*

relief, 4 NEWBERG ON CLASS ACTIONS § 13:51 (5th ed.). "In evaluating the value of the class members' claims, the court need not decide the merits of the case nor substitute its judgment of what the case might be worth for that of class counsel; however, 'the court must at least satisfy itself that the class settlement is within the 'ballpark' of reasonableness.'" *Id.* (citation omitted).

In reaching the Settlement, Plaintiffs achieved their principal goal of effectuating meaningful changes to the Products and the Products' labels. The proposed Settlement provides for valuable injunctive relief in the form of Product reformulations and/or modifications to labeling and advertising materials (Agreement at § 4), which is the exact relief sought by the Plaintiffs on behalf of the injunctive relief class certified by this Court on October 15, 2020. (Dkt. No. 72). The value of this substantive and widespread change to Defendant's practices cannot be overstated. These reformulations and/or labelling changes achieve the goals of this lawsuit – providing more relevant information to Neurobrands consumers. *See Riker v. Gibbons*, No. 3:08-cv-00115-LRH-VPC, 2010 WL 4366012, at *4 (D. Nev. Oct. 27, 2010) (approving a settlement for injunctive and declaratory relief, finding that it "achieve[d] the goals of the lawsuit"). These changes will address the harm allegedly caused to the Class and provide Plaintiffs and the Class with invaluable relief going forward – a change in Product formulations and/or labeling and informational disclosures. Indeed, the primary form of relief under the UCL and FAL is injunctive in nature. *See* Cal. Bus. & Prof. Code §§ 17200, 17500. The harm that these statutes seek to redress is false or deceptive advertising in the marketplace. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 320 (2009); *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 954 (2017). The Settlement Agreement accomplishes this goal. *See* Agreement §§ 4.1-4.3. The prospect of continued litigation would have only delayed implementation of injunctive relief to the Class. And in any event, class members do not waive their right to pursue monetary damages or personal injury damages under the Settlement. Agreement § 6.2.

Here, the injunctive relief provided to the Class under the Settlement is more than adequate considering (i) the costs, risks, and delay of trial and appeal; and (ii) the terms of any proposed

award of attorney's fees. *See* Fed. R. Civ. P. 23(e)(2)(C); Procedural Guidance (1)(e).[6]

i. The Costs, Risks, and Delay of Trial

The costs, risks, and delay of trial and appeal further support preliminary approval. Proceeding in this litigation in the absence of settlement poses various risks. The Settlement provides relief to the Class without the risks, costs, and delays inherent in continued litigation, all of which are important factors in considering the reasonableness of the Settlement. *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575-76 (9th Cir. 2004); *see also Rodriguez v. Bumblebee Foods, LLC*, 2018 U.S. Dist. LEXIS 69028, at *8 (S.D. Cal. Apr. 24, 2018) ("It has been held proper to take the bird in hand instead of a prospective flock in the bush.") (internal quotation marks omitted); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (same).

Continued litigation would have carried significant costs, risks, and delay with little additional payoff. Absent the Settlement, Plaintiffs anticipate Defendant would have continued to aggressively challenge Plaintiffs' claims—by filing summary judgment and *Daubert* motions, and even a motion to decertify the class. Despite Plaintiffs' confidence in the facts and legal theory that underpin their claims, they recognize that proceeding in this litigation in the absence of settlement poses various risks such as having summary judgment granted against Plaintiffs and the certified class or losing at trial. Such considerations have been found to weigh heavily in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, No. C 06-3903 THE, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class."). Even though Plaintiffs were able to certify a class, there is also a risk that the Court could later decertify the class action. *See In re Netflix Privacy Litig.,* No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18,

[6] Because the Settlement provides only injunctive relief pursuant to Rule 23(b)(2), there is no claims process or distribution plan. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). Moreover, no agreements were made in connection with the settlement aside from the Settlement Agreement itself. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv); *see also* Marron Decl., ¶ 15.

2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement.") (internal citations omitted). The Settlement eliminates these risks by ensuring Class Members a recovery that is "certain and immediate, eliminating the risk that class members would be left without any recovery ... at all." *Fulford v. Logitech, Inc*., No. 08-cv-02041 MNC, 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010).

Considering the costs, risks, and delay associated with continued litigation, the robust injunctive relief secured through the Settlement represents an excellent result for the Class. Therefore, preliminary approval should be granted.

ii. The Proposed Attorneys' Fee Award is Fair and Reasonable

As discussed above, the Settlement Agreement provides that Class Counsel may request an award of attorneys' fees and out-of-pocket expenses of up to $750,000. Agreement § 8.1. The Parties negotiated the payment of reasonable attorney's fees and expenses only *after* they reached agreement in principle with respect to the proposed injunctive relief set forth in the Settlement. Marron Decl., ¶ 16.

As the Ninth Circuit and Supreme Court have noted, "the lodestar method yields a fee that is presumptively [reasonable]." *In re Hyundai & Kia Fuel Econ. Litig*., 926 F.3d 539, 571 (9th Cir. 2019) (quoting *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Based on preliminary review, Class Counsel estimates that their lodestar for this action is approximately $600,000 based on 1180 hours attributable to successfully prosecuting this action. Marron Decl., ¶ 17. Class Counsel also anticipates devoting at least 70 additional hours to the action, including monitoring Defendant's progress on Product reformulation and potential label modifications in the future, and in obtaining final approval of the Settlement. *See id*. This additional time billed at a blended rate would add an additional $38,000 to Class Counsel's lodestar. *See id*. Class Counsel's fee request of $750,000 would also cover the reimbursement of approximately $25,000 in costs and expenses that were reasonably necessary to prosecute this action. Marron Decl., ¶ 18. Accordingly, Class Counsel's anticipated fee request is reasonable in view of their lodestar and fees equaling $663,000, which would presently result in a modest multiplier of 1.14.

4. The Proposed Settlement Treats Class Members Equitably Relative to Each Other

Rule 23(e)(2)(D) requires the Court to consider whether the settlement agreement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Here, the Settlement benefits all Class Members equally by requiring uniform Product reformulations or Product labeling modifications. Because each class member is treated equally, the Court should approve the settlement as fair, reasonable, and adequate.

VI. ADDITIONAL FACTORS SUPPORTING APPROVAL OF SETTLEMENT

In addition to the factors set forth in Rule 23(e), courts may consider additional factors in contemplating preliminary approval, such as the "strength of the plaintiff's case," "the complexity and likely duration of further litigation," "the extent of discovery completed and the stage of the proceedings," and "the experience and views of counsel" *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 967 (N.D. Cal. 2019). *See also Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (same).

1. Strength of Plaintiffs' Case

In determining the likelihood of a plaintiff's success on the merits of a class action, "the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 625 (9th Cir. 1982) (internal quotations omitted). The court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiffs' likelihood of recovery." *Garner v. State Farm. Mut. Auto. Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010) (citing *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)). Here, settlement negotiations were hard-fought, requiring a full day mediation session, with both Parties and their counsel thoroughly familiar with the applicable facts, legal theories, and defenses on both sides. *See* Marron Decl., ¶¶ 10-13. Plaintiffs and Class Counsel believe that the Settlement is an outstanding result considering the issues addressed below.

Although Plaintiffs believe that proving Defendant's liability would be possible here, there

is no guarantee that the judge would agree. Prior to filing this action, Plaintiffs' counsel conducted testing on Neurobrands' Products confirming that artificial dl-malic acid is used as an ingredient in the Products. *See* Dkt. No. 18, ¶ 25. However, Defendant argued that it uses malic acid in the Products as a "pH control agent" instead of a flavoring ingredient, and therefore that its labels comply with applicable FDA regulations. *See* 21 C.F.R. § 170.3(o)(23) (defining pH control agents); 21 C.F.R. 184.1069(c) (stating malic acid can be used as a flavor enhancer, flavoring agent, and pH control agent). Determining the function of malic acid in the Products would certainly devolve into an uncertain "battle of the experts." Defendant would no doubt present a vigorous defense at the bench trial, and there is no assurance that the Class would prevail.

2. The Complexity and Likely Duration of Further Litigation

Litigation of this action required counsel trained in class action law and procedure as well as the acquisition and analysis of a significant amount of factual and legal information. Class Counsel possess these attributes, and their participation added value to the representation of this Class. The record demonstrates that the Action involved complex and novel challenges, which Class Counsel met at every juncture.

Further, the likely duration of further litigation weighs in favor of settlement approval. This action was filed on September 26, 2018 – over nearly three years ago – and was the work of substantial pre-filing investigation. *See* Dkt. No. 1. The action has been hard-fought, including substantial discovery and motion practice. Marron Decl., ¶¶ 4-9. Plaintiffs are mindful that proceeding with the action would result in further delay in an action which has already been pending for several years.

3. The Extent of Discovery and Status of Proceedings

Under this factor, courts evaluate whether class counsel had sufficient information to make an informed decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Here, the Parties have engaged in extensive discovery, including written discovery, depositions, third-party discovery, and hiring of experts, as outlined in Section II, *supra*. Through the substantial and extensive discovery that was performed, Class Counsel have been provided with sufficient information to make an informed decision about the terms of the

Settlement. Marron Decl., ¶¶ 10-13. Moreover, Class Counsel has reviewed FDA regulations regarding artificial flavoring regulations and background evidence relating to the Products' claims. *See id*. Therefore, this factor supports preliminary approval. *See Carr*, 2014 WL 7497152, at *7 ("Given the apparent depth of Class Counsel's knowledge of the relevant law and Defendant's company, this factor weighs in favor of settlement.").

4. Experience and Views of Counsel

The recommendations of Class Counsel should be given a presumption of reasonableness." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). Deference to Class Counsel's evaluation of the Settlement is appropriate because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967. Here, the Settlement was negotiated by counsel with extensive experience in consumer class action litigation. *See* Marron Decl., ¶¶ 20-51 & Ex. 2 (firm resume of Law Offices of Ronald A. Marron). Based on their experience, Class Counsel concluded that the Settlement provides exceptional results for the class while sparing the class from the uncertainties of continued and protracted litigation. Marron Decl., ¶ 15.

For all the foregoing reasons, the Settlement is fair, adequate, and reasonable, and should be preliminarily approved.

VII. THE SETTLEMENT SATISFIES THE DISTRICT'S PROCEDURAL GUIDANCE

The discussion in other sections of this brief provides relevant information regarding (and is equally applicable to) Procedural Guidance 1(b) (*see* Section III(1)); Procedural Guidance 1(d) (*see* Section III(5)); Procedural Guidance 1(e) (*see* Section V(2)); Procedural Guidance 5 (*see* Section III(4)), Procedural Guidance 6 (*see* Section V(3)(ii)). Because a litigation class has been certified and because the Settlement provides injunctive relief pursuant to Rule 23(b)(2), provisions 1(a), 1(c), 1(f), 1(g), 1(h), 4, 8, and 11 of the Procedural Guidance do not apply. The remaining provisions are addressed below.

1. Settlement Administrator Selection Process (Procedural Guidance 2)

To select a settlement administrator, Class Counsel and Defendant's Counsel solicited bids from six (6) well-known and experienced administrators. *See* Marron Decl., ¶ 19. After considering

the bids, making further inquiries with the various administrators, and further negotiating the cost of notice, the Parties selected Kroll Settlement Administration based on its vast experience in similar class actions and a notice plan proposal that includes sophisticated means of notice to settlement class members. *See id*. Class Counsel has previously worked with Kroll Settlement Administration on 3 different matters in the past two years. *See id*.

The total cost of the proposed notice plan is approximately $20,000. *See* Agreement at Ex. C. These costs are reasonably necessary to establish a settlement website and to inform potential class members about the Settlement and direct them to the settlement website. The costs of notice to the Settlement Class will be paid for separately by Defendant. *See* Agreement § 5.1.

2. The Proposed Notice Plan (Procedural Guidance 3)

Notice is discretionary and not typically required for settlements that seek only injunctive, non-monetary relief. *See* Fed. R. Civ. P. 23(c)(2); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) ("The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice.").[7] For Rule 23(b)(2) classes, the Advisory Committee on the Federal Rules directs courts to exercise their authority to direct notice with care because the characteristics of (b)(2) classes reduce the need for notice. *See* 2003 Advisory Comm. Notes on Fed. R. Civ. P. 23. Thus, "the discretion and flexibility established by subdivision (c)(2)(A) extend[s] to the method of giving notice," including informal methods such as "[a] simple posting in a place visited by many class members, directing attention to a source of more detailed information . . ." *Id.*

Here, the Parties have agreed to provide notice to the Class in accordance with the Notice

[7] *See also Garcia v. Los Angeles Cty. Sheriff's Dep't*, No. CV 09-8943 MMM (SHX), 2015 WL 13646906, at *7 (C.D. Cal. Sept. 14, 2015) ("The court thus has discretion in determining whether notice to a Rule 23(b)(2) class is required, and to what extent."); *JEANNE & NICOLAS STATHAKOS v. COLUMBIA SPORTSWEAR COMPANY*, No. 4:15-CV-04543-YGR, 2018 WL 582564, at *3 (N.D. Cal. Jan. 25, 2018) ("In injunctive relief only class actions certified under Rule 23(b)(2), federal courts across the country have uniformly held that notice is not required."); *Lilly v. Jamba Juice Co.*, No. 13-CV-02998-JST, 2015 WL 1248027, *8-9 (N.D. Cal. Mar. 18, 2015) (holding that because the settlement class would not have the right to opt out from the injunctive settlement and the settlement did not release the monetary claims of class members, class notice was not necessary).

Plan. *See* Agreement at Ex. C. Under the terms of the Proposed Order, 15 days after the Court's preliminary approval order, Kroll Settlement Administration will publish a Notice to class members on a Settlement website. *See id*. The contents of the Notices are formulated in plain, easy-to-understand language to alert Class Members of the pendency of the Settlement and the opportunity to object and be heard. *See In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2019 WL 387322, at *5 (N.D. Cal. Jan. 30, 2019) (notice contents should contain "'plain, easily understood language' and 'generally describe the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'") (quoting Fed. R. Civ. P. 23(c)(2); *Churchill Vill. L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)).

Consistent with this District's Procedural Guidance, the Notice informs Class Members of (1) Class Counsel's contact information; (2) the address of the Class Settlement Website maintained by the Settlement Administrator that links to important case documents, including motion for preliminary approval papers, and instructions on how to access the case docket via PACER or in person; (3) the pendency of the litigation and of the Settlement, including the terms thereof; (4) the Class Representatives' applications for incentive awards; (5) the procedures for filing an objection to the Settlement; (6) important dates in the settlement approval process, including the date of the Final Approval Hearing; and (7) Plaintiffs' forthcoming Attorneys' Fees Motion. *See* Agreement at Exs. A & B. The Notices accurately inform Class Members of the salient terms of the Settlement, the Certified Class, the final approval hearing and the rights of all parties, including the right to file objections. The Parties in this case have created and agreed to utilize the following forms of notice, which will satisfy both the substantive and manner of distribution requirements of Rule 23 and due process. *See* Exhibits A, B, and C to Settlement Agreement.

This proposed notice program provides a fair opportunity for Class Members to obtain full disclosure of the conditions of the Settlement. Thus, the notices and notice procedures are fair and appropriate.

3. Incentive Awards (Procedural Guidance 7)

Pursuant to the Settlement, Class Counsel intends to seek, and Defendant agrees to pay,

incentive awards not to exceed $5,000 for each class representative. Agreement § 8.1. Each Plaintiff devoted extensive resources and energy to this action. First, Plaintiffs provided information to Class Counsel that informed the class action complaints and, thereafter, regularly communicated with Class Counsel about major case developments throughout the litigation. *See* Young Decl., at ¶ 3; *see also* Goodwin Decl., at ¶ 3. Second, during the course of discovery, Plaintiffs provided information to respond to written interrogatories and requests for production and verified the accuracy and truthfulness of the discovery responses. *See* Young Decl., ¶ 4; Goodwin Decl., ¶ 4. Third, Plaintiffs each prepared for and sat for deposition. *See* Young Decl., ¶ 5; *see also* Goodwin Decl., ¶ 5. Finally, each Plaintiff reviewed and approved the Settlement after consulting with Class Counsel. *See* Young Decl., ¶ 8; *see also* Goodwin Decl., ¶ 8. In light of this work, these awards are eminently reasonable and supported by law. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 335 (N.D. Cal. 2014) ($5,000 incentive award is presumptively reasonable).

4. Class Action Fairness Act (Procedural Guidance 10)

The Settlement requires the Notice Administrator to serve notice of the Settlement Agreement that meets the requirements of CAFA, 28 U.S.C. § 1715 no later than ten (10) days after the filing of the Settlement Agreement with the Court. *See* Agreement § 5.7.1.

5. Proposed Schedule of Events (Procedural Guidance 9)

In connection with Preliminary Approval of the Settlement, the Court should also set a date and time for the Final Approval Hearing. Other deadlines in the Settlement approval process, including the deadline to object to the Settlement, will be determined based on the date of the Final Approval Hearing or the date on which the Preliminary Approval Order is entered. The Parties respectfully propose the following schedule:

EVENT	DEADLINE
Class Settlement Website Activated	Within 15 days after Order Granting Preliminary Approval
Notice First Published in Print Sources	Within 30 days after Order Granting Preliminary Approval
Class Counsel to File Motion for Attorney's Fees and Costs and Incentive	No later than 65 days before Final Approval Hearing

Awards	
Last Day to File or Postmark Objections	No later than 30 days before Final Approval Hearing
Last Day for Objectors to File Notice of Intent to Appear at Final Approval Hearing	No later than 30 days before Final Approval Hearing
Plaintiffs to File Motion for Final Approval	No later than 21 days before Final Approval Hearing
Last Day to File Responses to Objections to Settlement	No later than 7 days before Final Approval Hearing
Final Approval Hearing	[Date to be determined based on Court's availability]

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that the Court (1) Preliminarily Approve Class Action Settlement, (2) Confirm Certification of the Class, (3) Confirm the Law Offices of Ronald A. Marron, APLC as Class Counsel; (4) Confirm Renee Young and Joycette Goodwin as Class Representatives, (5) Approve Kroll Settlement Administration as the Notice Administrator; (6) Approve the Proposed Notice Plan, and (7) Set a Hearing for Final Approval of the Proposed Settlement.

Dated: May 18, 2021

Respectfully Submitted,

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