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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

IN RE CONAGRA FOODS, INC.

Case No.: CV 11-05379-CJC(AGR_x)

MDL No. 2291

**ROBERT BRISEÑO, et al., individually
and on behalf of all others similarly
situated,**

**ORDER GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT [Dkt. 650]**

Plaintiffs,

v.

CONAGRA FOODS, INC.,

Defendants.

I. INTRODUCTION & BACKGROUND

From at least June 27, 2007 until July 1, 2017, every bottle of Defendant Conagra Foods, Inc.’s Wesson Oil carried a front label stating that the product was “100%

1 Natural.”¹ Plaintiffs in this action, residents of eleven different states, filed a complaint
2 alleging that the “natural” claim on Wesson Oil bottles was false and misleading because
3 the products contain genetically modified organisms (GMOs). The Court subsequently
4 certified eleven classes of consumers who purchased Wesson Oils during the applicable
5 statute of limitations periods in California, Colorado, Florida, Illinois, Indiana, Nebraska,
6 New York, Ohio, Oregon, South Dakota, or Texas. Defendant appealed the class
7 certification order to the Ninth Circuit, who subsequently affirmed. *See Briseño v.*
8 *ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017); *Briseño v. ConAgra Foods, Inc.*,
9 674 F. App’x 654 (9th Cir. 2017).

10
11 On January 29, 2018, the parties held an all-day mediation session before retired
12 Judge Edward A. Infante. (Dkt. 652 [Joint Declaration of Henry J. Kelson & Adam J.
13 Levitt, hereinafter “Kelson-Levitt Decl.”] ¶ 51.) Between January 29 and March 19,
14 Judge Infante engaged in extensive correspondence and held numerous telephone
15 conferences with each party, but he was ultimately unable to forge a settlement. (*Id.*) On
16 June 8, 2018, this Court referred the parties to Magistrate Judge McCormick for further
17 settlement discussions. (*Id.* ¶ 52.) Judge McCormick met with both parties at that time
18 and held another in-person settlement conference on August 30, 2018. (*Id.*) In mid-
19 October 2018, the parties reached an agreement in principle regarding the monetary relief
20 to class members and the provisions of injunctive relief. (*Id.*) The parties continued to
21 negotiate the value of injunctive relief, the amount of attorneys’ fees, and the selection of
22 a settlement administrator. (*Id.* ¶ 53.) The parties ultimately accepted a “mediator’s
23 proposal” on the value of injunctive relief and the amount of attorneys’ fees. (*Id.*) Judge
24 McCormick then accepted proposals for settlement administrators from both sides to
25 ultimately select a settlement administrator. (*Id.* ¶¶ 64–65.)

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¹ In July 2017, Conagra Foods, Inc. removed the “100% Natural” claim from all Wesson labels.

1 Plaintiffs now seek preliminary approval of the proposed Settlement Agreement.
2 (Dkt. 650.) The proposed Settlement Agreement provides that Defendant will not label,
3 advertise, or market Wesson Oils as “natural,” absent future legislation or regulation.
4 (Dkt. 652 Ex. 1 [Settlement Agreement and Release, hereinafter “Settlement
5 Agreement”] ¶ 3.3.) The parties value this injunctive relief at \$27 million. The
6 Settlement Agreement further provides the following monetary benefits to class
7 members: (a) \$0.15 for each unit of Wesson Oils purchased by members of each of the
8 eleven classes to households submitting valid claim forms (to a maximum of thirty units
9 without proof of purchase, and unlimited units with proof of purchase), (b) an additional
10 fund of \$575,000 to be allocated to members of the New York and Oregon state classes
11 who submit valid claim forms, as compensation for the statutory damages in those states’
12 consumer protection laws, and (c) an additional fund of \$10,000 to compensate those in
13 all classes who submit valid proof of purchase receipts for more than thirty purchases, at
14 \$0.15 for each such purchase above thirty. (*Id.* ¶ 3.1.) For the following reasons,
15 Plaintiff’s motion for preliminary approval of the class action settlement is **GRANTED**.²
16

17 **II. ANALYSIS**

18

19 Where plaintiffs seek to settle a lawsuit on behalf of a certified class, Federal Rule
20 of Civil Procedure 23(e) “requires the district court to determine whether a proposed
21 settlement is fundamentally fair, reasonable, and accurate.” *Staton v. Boeing Co.*, 327
22 F.3d 938, 959 (9th Cir. 2003) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026
23 (9th Cir. 1998)). To determine whether this standard is met, a district court must consider
24 a number of factors, including “the strength of the plaintiffs’ case; the risk, expense,
25 complexity, and likely duration of further litigation; the risk of maintaining class action
26

27 ² Having read and considered the papers presented by the parties, the Court finds this matter appropriate
28 for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set
for April 15, 2019, at 1:30 p.m. is hereby vacated and off calendar.

1 status throughout the trial; the amount offered in settlement; the extent of discovery
2 completed, and the stage of the proceedings; the experience and views of counsel; . . . and
3 the reaction of the class members to the proposed settlement.” *Id.* (quoting *Molski v.*
4 *Gleich*, 318 F.3d 937, 953 (9th Cir. 2003)). At the preliminary approval stage, a full
5 “fairness hearing” is not required. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078,
6 1079 (N.D. Cal. 2007). Rather, the inquiry is whether the settlement “appears to be the
7 product of serious, informed, non-collusive negotiations, has no obvious deficiencies,
8 does not improperly grant preferential treatment to class representatives or segments of
9 the class, and falls within the range of possible approval.” *Id.*

10
11 Having reviewed the arms-length negotiation process and substantive terms of the
12 Settlement Agreement, the Court finds no obvious deficiencies or grounds to doubt its
13 fairness. The parties did not settle until after the parties engaged in eight years of
14 litigation, the Ninth Circuit upheld class certification, the parties conducted significant
15 discovery, and the parties attended multiple settlement conferences before two neutral
16 mediators. *See In re Heritage Bond Litig.*, 2005 WL 1594403, at *9 (C.D. Cal. June 10,
17 2005) (“A presumption of correctness is said to attach to a class settlement reached in
18 arm’s-length negotiations between experienced capable counsel after meaningful
19 discovery.” (internal quotation and citations omitted)). There is no evidence of collusion
20 during the parties’ settlement negotiations. Indeed, “[t]he assistance of an experienced
21 mediator in the settlement process confirms that the settlement is non-collusive.”
22 *Satchell v. Fed. Express Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007).

23
24 The Settlement Agreement also presents a fair compromise in light of the risks and
25 expense of continued litigation. Defendant vigorously opposed class certification and the
26 parties already spent several years litigating the issue before the Ninth Circuit. The
27 parties, after substantial discovery, substantive briefing, and the assistance of two
28 mediators, were able to realistically value Defendant’s liability and assess the risk of

1 moving forward with possible motions to decertify the class, possible *Daubert* motions,
2 motions for summary judgment, and potentially trial. (Kelson-Levitt Decl. ¶¶ 32–50, 60.)
3 Litigation had reached a stage where the parties had a clear view of the strengths and
4 weaknesses of their positions to reach a fair and reasonable settlement. In particular,
5 Plaintiffs would have difficulty proving that all class members purchased Wesson Oils
6 during the relevant time period and that they paid a premium because Wesson Oils were
7 labeled and advertised as “100% Natural.”

8
9 Given these risks, the amount and terms of the settlement are reasonable. The
10 parties jointly estimate the value of the injunctive relief, in which Defendant agrees to
11 stop labeling, advertising, or marketing Wesson Oils as “natural,” at \$27 million.
12 (Kelson-Levitt Decl. ¶ 10.) The Settlement Agreement provides monetary compensation
13 of \$0.15 per unit to class members. (*Id.* ¶ 17.) This monetary compensation is
14 approximately 36% higher than what class members could obtain at trial, which is
15 approximately 10.2 cents per unit, according to Plaintiffs’ own expert. (*Id.* ¶ 18.) The
16 Settlement Agreement further provides a \$575,000 fund to be allocated solely among
17 New York and Oregon Class Members who submit valid claim forms, in proportion to
18 the number of units they purchased during the relevant time period. (*Id.*; Mot. at 15.)
19 This fund is intended to compensate the New York and Oregon Class Members for the
20 statutory damages provided in the consumer protection laws of those states. *See* N.Y.
21 Gen. Bus. Law § 349(h) (enabling individuals to recover actual damages or statutory
22 damages of \$50 per purchase, whichever is greater); Or. Rev. Stat. § 646.638 (allowing
23 plaintiffs to recover actual damages, or statutory damages of \$200, whichever is greater).
24 In light of the significant hurdles to recovery if litigation were to continue, the classes’
25 recovery is a fair result.

26
27 The settlement amount is also well within the range of reasonableness when
28 compared to the settlements in similar cases where plaintiffs alleged it was misleading to

1 label and market products as “natural” when the products contained GMOs. *See, e.g.,*
2 *Pappas v. Naked Juice Co. of Glendora, Inc.*, 2014 WL 12382279, at *19 (C.D. Cal. Jan.
3 2, 2014) (approving class settlement valued at total of \$10.4 million where defendants
4 allegedly misrepresented beverage products as “All Natural” and “Non-GMO”).

5
6 **A. Attorneys’ Fees and Incentive Award**

7
8 Plaintiffs’ counsel also intend to seek attorneys’ fees in a total amount of
9 \$6,850,000. Any attorneys’ fees and costs will be paid by Defendant separate from and
10 in addition to the benefits provided to class members. The Ninth Circuit has established
11 25% of the common fund as the “benchmark” award for attorney fees. *Torrisi v. Tucson*
12 *Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). The parties do not estimate the total
13 value of the monetary benefits, but the Ninth Circuit has held that district courts should
14 also “take into account the present nonmonetary benefit bestowed upon plaintiffs’ class”
15 in determining the appropriateness of a fee award. *Loring v. City of Scottsdale*, 721 F.2d
16 274, 275 (9th Cir. 1983); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392–93
17 (1970) (concluding that attorneys’ fees may be awarded when the litigation has conferred
18 a substantial benefit on the class even where a suit “has not yet produced, and may never
19 produce, a monetary recovery” under the “common fund” doctrine). Here, the requested
20 total for attorneys’ fees represents approximately 25.4% of the parties’ estimated present
21 value of the injunctive relief or 23% of Plaintiffs’ conservative estimated value of
22 injunctive relief.³ Class counsel estimate that this award is approximately 50% of class
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24
25 ³ The conservative estimate of the total value of the labeling and marketing changes is \$30,600,000.
26 (Kelson-Levitt Decl. ¶ 63.) Plaintiffs’ damages expert calculates the value of the labeling change from
27 July 1, 2017 to February 25, 2019 as approximately \$19,080,000. (*Id.* ¶ 12.) Defendant sold its Wesson
28 Oil brand to Richardson International on February 25, 2019, and it is highly unlikely that Richardson
International will resume labeling the products as “natural” without affirmative legislative or regulatory
authorization. (*Id.* ¶¶ 10, 14.) Assuming one additional year passes without “natural” claims being
restored to Wesson Oil labels, the value of the labeling change would reach approximately \$30,600,000.
(*Id.* ¶ 16.)

1 counsel's actual total combined lodestar and unreimbursed expenses. (Kelson-Levitt
2 Decl. ¶ 63.) The Court finds the request for attorneys' fees is reasonable.

3
4 Class counsel also request service rewards of up to \$3,000 for each of the six class
5 representatives who were deposed (Robert Briseño, Michele Andrade, Jill Crouch,
6 Pauline Michael, Necla Musat, and Maureen Towey) and up to \$1,000 for each of the
7 seven class representatives who were not deposed (Julie Palmer, Cherie Shafstall, Dee
8 Hooper-Kercheval, Kelly McFadden, Erika Heins, Rona Johnston, and Anita Willman).
9 These awards are separate from and in addition to the other settlement benefits. Plaintiffs
10 have been involved in this litigation for more than eight years, including responding to
11 discovery requests seeking detailed information regarding their dietary and food
12 purchasing habits and requesting empty food containers in their homes. The awards are
13 within the range of incentive awards typically approved by district courts. *See In re Toys*
14 *R Us-Del., Inc.—Fair & Accurate Credit Transactions Act Litig.*, 295 F.R.D. 438, 470
15 (C.D. Cal. 2014) (explaining that California district courts typically approve incentive
16 awards between \$3,000 and \$5,000). The Court finds the request for incentive awards is
17 reasonable.

18
19 **B. Settlement Administrator**

20
21 Plaintiff requests appointment of JND Legal Administration as the settlement
22 administrator and approval of an amount no more than \$660,00 to be paid by Defendant
23 separate from and in addition to the other settlement benefits provided to class members.
24 (Mot. at 23; Kelson-Levitt Decl. ¶ 66.) The parties each solicited confidential bids from
25 companies to provide notice and administration services in conjunction with the proposed
26 settlement. (*Id.* ¶ 64.) The bids were submitted to Judge McCormick, who ultimately
27 chose JND Legal Administration to propose to the Court to serve as the settlement
28 administrator. (*Id.* ¶ 65.) In addition to being selected by a neutral third party, JND

1 Legal Administration appears to be well qualified to administer the claims in this case.
2 JND Legal Administration has administered hundreds of class action settlements,
3 including the \$20 billion Gulf Coast Claims Facility, the \$10 billion Deepwater Horizon
4 BP Settlement, and the \$6.15 billion WorldCom Securities Settlement. (Settlement
5 Agreement Ex. A-4 [Declaration of Jennifer M. Keough, hereinafter “Keough Decl.”]
6 ¶¶ 3, 9.) The Court appoints JND Legal Administration as Settlement Administrator.

8 C. Notice of the Proposed Settlement

9
10 Finally, Plaintiff seeks approval of the proposed manner and form of the notice that
11 will be sent to the Class Members. Rule 23(c)(2)(B) provides that for Rule 23(b)(3)
12 classes, as here, the Court “must direct to class members the best notice that is practicable
13 under the circumstances, including individual notice to all members who can be
14 identified through reasonable effort.” The proposed manner of notice outlined in the
15 Settlement Agreement satisfies this standard. (*See* Settlement Agreement ¶ 4.3; *id.* Ex.
16 A-2 [Publication Notice], *id.* Ex. A-3 [Posted Notice]; *id.* Ex. A-4 [Notice Plan].) Since
17 class members’ contact information is not readily known, JND Legal Administration will
18 reach class members through a consumer media campaign, including a national print
19 effort in *People* magazine, a digital effort targeting consumers in the relevant states
20 through Google Display Network and Facebook, newspaper notice placements in the *Los*
21 *Angeles Daily News*, and an internet search effort on Google. (Keough Decl. ¶ 14.) JND
22 Legal Administration will also distribute press releases to media outlets nationwide and
23 establish a settlement website and toll-free phone number. (*Id.*) The print and digital
24 media effort is designed to reach 70% of the potential class members. (*Id.*) The
25 newspaper notice placements, internet search effort, and press release distribution are
26 intended to enhance the notice’s reach beyond the estimated 70%. (*Id.*)

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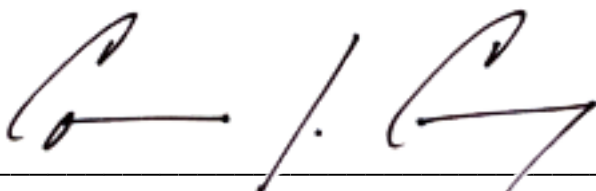
1 The form of notice also meets the requirements of Rule 23(c)(2)(B). Notice to
2 Class Members must “clearly and concisely state, in plain, easily understood language:
3 (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims,
4 issues or defenses; (iv) that the class member may enter an appearance through an
5 attorney if the member so desires; (v) that the court will exclude from the class any
6 member who requests exclusion; (vi) the time and manner for requesting exclusion, and
7 (vii) the binding effect of a class judgment on members under Rule 23(c)(3).” Fed. R.
8 Civ. P. 23(c)(2)(B). Here, the proposed Class Notice provides clear information about
9 the definition of the class and nature of the action, a summary of the terms of the
10 proposed settlement, the process of objecting to the settlement, and the consequences of
11 inaction. (Settlement Agreement Ex. A-2 [Publication Notice], *id.* Ex. A-3 [Posted
12 Notice].) The Class Notice will also provide specific details regarding the date, time, and
13 place of the Final Approval Hearing and inform Class Members that they may enter an
14 appearance. (*See id.*)

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1 **III. CONCLUSION**

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3 For the foregoing reasons, the Court **GRANTS** preliminary approval of the
4 Settlement Agreement. The Court hereby **APPOINTS** Milberg Tadler Phillips
5 Grossman LLP and DiCello Levitt Gutzler LLC as class counsel and the following
6 persons as class representatives: Robert Briseño and Michele Andrade for the California
7 Class, Jill Crouch for the Colorado Class, Julie Palmer for the Florida Class, Pauline
8 Michael for the Illinois Class, Cheri Shafstall for the Indiana Class, Dee Hooper-
9 Kercheval for the Nebraska Class, Kelly McFadden and Necla Musat for the New York
10 Class, Maureen Towey for the Ohio Class, Erika Heins for the Oregon Class, Rona
11 Johnston for the South Dakota Class, and Anita Willman for the Texas Class.⁴ The Court
12 **APPOINTS** JND Legal Administration as Settlement Administrator. The Court also
13 **APPROVES** the proposed Class Notice and orders that it be disseminated to the class as
14 provided in the Settlement Agreement. The final approval hearing shall be held on
15 **Monday, October 7, 2019, at 1:30 p.m.**

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19 DATED: April 4, 2019

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21 _____
22 CORMAC J. CARNEY
23 UNITED STATES DISTRICT JUDGE
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27 ⁴ The Court previously appointed Milberg LLP and Wolf Haldenstein Adler Freeman & Herz LLC as
28 interim class counsel. (Dkt. 48.) In the class certification order, the Court ruled that the “named
plaintiffs and class counsel satisfy Rule 23(a)’s adequacy requirement,” but did not expressly appoint
class representatives or class counsel. (Dkt. 545 at 57.)