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CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

IN RE CONAGRA FOODS, INC.

Case No. CV 11-05379-CJC (AGRx)

MDL No. 2291

<u>CLASS ACTION</u>

RENEWED MOTION AND MEMORANDUM IN SUPPORT FOR FINAL APPROVAL OF THE SETTLEMENT AND AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

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I. INTRODUCTION

After multiple rounds of private negotiations and with the assistance of two separate mediators—one of whom is a sitting federal magistrate judge appointed by this Court to mediate this case—the Parties (Plaintiffs and Defendant Conagra) ultimately reached a settlement with the assistance of Magistrate Judge Douglas F. McCormick after what was then eight, hard-fought years of litigation. Although the per-unit settlement relief for the certified classes (and the sole Objector), was more than they (and he) could have achieved had Plaintiffs been successful at trial, class counsel's proposed attorneys' fees (which only amounted to half of their lodestar) were greater than the total dollar amount of claims filed. The Objector appealed, arguing that this "misallocation" violated Rule 23(e). While the Ninth Circuit did not find that such settlements should be *per se* rejected, it reversed the Court's order approving the settlement, remanding the case after providing clarity that "district courts must apply the *Bluetooth* factors to scrutinize fee arrangements—even in post-class certification settlements—to determine if collusion may have led to class members being shortchanged." *Briseño v. Henderson*, 998 F.3d 1014, 1026 (9th Cir. 2021) (citing *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 941 (9th Cir. 2011)). In making this determination, the Panel pointed to "three red flags" that the district court needed to examine upon remand in this case:

> Disproportionate fee awards, clear sailing agreements, and kicker clauses all may be elements of a good deal. But, as we explained in *Bluetooth*, they may also signal a collusive settlement, and district courts must scrutinize them where they appear. . . . The district court thus should give a hard look at the settlement agreement to ensure that the parties have not colluded at the class members' expense.

Id. at 1027.

Unfortunately, it appeared as though the Ninth Circuit based its opinion on an incomplete understanding of the facts before this Court and the historical record of this hard-fought litigation. Accordingly, on remand, Magistrate Judge McCormick was asked by this Court to provide a declaration explaining how the settlement was negotiated, explaining salient facts that would impact this Court's analysis of possible "collusion" based upon the Ninth Circuit's instructions on remand.

See Exhibit A (July 19, 2021 Hrg. Tr. at 6:5-24). Magistrate Judge McCormick submitted his declaration on September 8, 2021, noting, among other important facts, that:

- He spent five months and approximately 100 hours helping the parties to reach a settlement, noting "significant" "differences" between the parties' positions. ECF No. 739 ¶¶1-5.
- The value of potential injunctive relief was a major area of disagreement between the parties, because Plaintiffs believed their lawsuit was the "catalyst" for a label change by Conagra, and Conagra was trying to divest itself of the Wesson Oil brand. *Id.* ¶8. Ultimately, Magistrate Judge McCormick proposed that injunctive relief would be valued at $27 million. *Id.* at ¶14.
- Given the potentially-skeptical view that jurors and the Court would give to Plaintiffs' labeling claims, a claims-made settlement of 15 cents per each unit of Wesson-branded products purchased would be a "significant recovery for members of the class." *Id.* at ¶10.a.
- Attorneys' fees "would be a significant hurdle" for the case, considering the "lengthy docket containing well over 600 entries," as well as the thousands of hours class counsel spent on the case. *Id.* at ¶¶12-13. Accordingly, after the material terms of the settlement were negotiated, Magistrate Judge McCormick made a mediator's proposal that "Plaintiffs' counsel would agree to seek and [Conagra] would agree not to oppose attorney's fees and expenses of $6,850,000." *Id.* ¶14.
- Magistrate Judge McCormick would review proposals from the parties' proposed claims administrators, and *he* would select the notice and claims administrator. *Id.*

Importantly, Magistrate Judge McCormick was sensitive about the Ninth Circuit's comments regarding collusion, and offered additional insight into the settlement process in this case:

> I am sensitive to the fact that the parties should not be permitted to use the involvement of a sitting judicial officer to insulate a settlement that is collusive to the detriment of class members. In light of the Ninth Circuit's opinion, I have thought about these negotiations and my own role in them. I saw nothing in the parties' conduct before me to indicate that they were colluding at the class

> members' expense. As outlined above, the settlement agreement resolved several issues on which the outcome was uncertain and on which additional litigation would be expensive. Although the parties negotiated their differences on those issues respectfully, they also did so vigorously. Nearly every settlement term discussed in this declaration was the result of several rounds of proposals and counter-proposals. And several of the final terms, including attorney's fees, were resolved only after I made a proposal. I do believe that the court proposal, made after spending many hours listening to each side's concerns, was important to reaching an agreement.

ECF No. 739 ¶20.

Plaintiffs believe that Magistrate Judge McCormick's declaration directly addressed the Ninth Circuit's opinion, putting to bed the specter of purported "collusion" that has clouded this case since the Objector's first filing over two years ago. Unfortunately, Objector's counsel still maintains that the settlement violates Rule 23(e) because of "objective manifestations of impermissible misallocation that the Ninth Circuit calls 'collusion[.]'" *See* Exhibit F (Email exchange between T. Frank and class counsel). But the Objector's reading of the Ninth Circuit's ruling—that the settlement constitutes an "impermissible allocation" and should thus be outright rejected—is incorrect, and the Ninth Circuit did not create a new rule that a material difference between ultimate class recovery based on a low claims rate and a mediator's proposed amount for fees and expenses (which the Objector calls a "misallocation") is automatically "impermissible." In fact, the Ninth Circuit expressly rejected Objector's request to create such a rule when the Objector sought "clarification" of the opinion. App. ECF No. 70.[1] The Ninth Circuit was clear about what the Court should review on remand, and Plaintiffs believe that Magistrate McCormick's declaration, combined with the record before the Court (including the Joint Declaration of Class Counsel, "Joint Decl.," which provides extensive details

[1] "App. ECF" refer to the record on appeal in *Briseño v. Henderson*, No. 19-56297 (9th Cir.).

1 about the history of this litigation), provides more than sufficient grounds to grant final approval of
2 the settlement of this long-pending case.

3 **II. BACKGROUND**

4 **A. Procedural History**

5 Plaintiffs in this action, residents of eleven different states, allege that Conagra's "natural"
6 claim on Wesson Oil packaging was false and misleading because the products contain genetically-
7 modified organisms (known commonly as "GMOs"). Plaintiffs further allege that Wesson Oils
8 commanded a premium price due to the presence of the "100% Natural" claim on the label and that,
9 consequently, every class member was induced to pay more for Wesson Oils because of that false
10 and deceptive claim. Accordingly, Plaintiffs brought this Action on behalf of themselves and other,
11 similarly-situated consumers seeking to end Conagra's use of the "natural" claim and obtain monetary
12 compensation for the classes, *i.e.*, the price premium they allegedly paid for Wesson Oils because of
13 the presence of the "100% Natural" claim. Conagra denies Plaintiffs' allegations and believes that it
14 has a variety of meritorious defenses.

15 After some fits and starts, and strategic moves by Conagra (*see* Joint Decl. at ¶¶13, 44, 179),
16 in January 2018, the parties conducted a day-long mediation session with the Honorable Edward A.
17 Infante (Ret.), under the auspices of JAMS in San Francisco; at that time, they were unable to forge
18 a settlement. Ongoing efforts by Judge Infante and negotiations among the parties followed, still
19 without resolution. *Id.* ¶¶182-185. On June 8, 2018, this Court appointed Magistrate Judge Douglas
20 F. McCormick (C.D. Cal.) to explore whether he might facilitate a resolution—if not, the case would
21 head towards trial. Joint Decl. ¶186. From June through mid-October 2018, the Parties mediated
22 under the auspices of Judge McCormick, including an in-person settlement conference as well as
23 through extensive telephonic and email communications. *Id.* ¶187. With Magistrate Judge
24 McCormick's continued involvement, the parties negotiated monetary compensation to the classes,
25 the provision of the injunctive relief to class members and its valuation, the amount of attorneys' fees
26 class counsel would seek from the Court without Conagra's objection, and the selection of a
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settlement administrator based on competing proposals with detailed notice plans. Judge McCormick ultimately selected the settlement administrator. After the class relief was negotiated, on November 13, 2018, the parties accepted a "mediator's proposal," recommending that aggregate attorneys' fees and expenses for Plaintiffs be set at an amount not to exceed $6,850,000. ECF No. 739 ¶¶ 14-16. The Plaintiffs moved for preliminary approval of the settlement on March 12, 2019, and the Court issued its order granting preliminary approval on April 4, 2019. *See* ECF Nos. 650, 654. On October 7, 2019, the Court heard oral argument, during which Plaintiffs, Conagra, and the sole Objector were heard. ECF No. 694; Exhibit E (Oct. 7, 2019 Hrg. Tr.). The Court granted final approval on October 8, 2019, and the Objector appealed. ECF Nos. 695, 697. The case is now before this Court on specific remand instructions.

B. Key Settlement Terms

As the Court knows, the settlement requires Conagra to pay monetary benefits, including a per-unit amount that is *36% more* than class members could have obtained had Plaintiffs prevailed at trial,[2] in addition to a statutory damages fund for certain claimants, and a fund for individuals who

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[2] The Court previously rejected Plaintiffs' damages methodology that calculated a price premium attributable entirely to Conagra's use of the term "100% Natural," rather than the portion of that premium attributable to Plaintiffs' theory of liability—that is, that Conagra's "100% Natural" label on Wesson Oils caused putative class members to believe the products contained no genetically modified organisms or GMO ingredients. *In re Conagra Foods, Inc.*, 90 F. Supp. 3d 919, 1023 (C.D. Cal. 2015). The Court determined that an acceptable damages model in this case would involve taking the total price premium calculated by Plaintiffs' expert Colin Weir and multiplying it by the percentage derived from a conjoint analysis to produce a damages figure "attributable *solely to ConAgra's alleged misconduct—i.e.*, misleading consumers to believe that Wesson Oils contain no GMOs by placing a '100% Natural' label on the products." *Id.* at 1025. This methodology was upheld on appeal, *Briseño v. ConAgra Foods, Inc.*, 674 Fed. App'x 654, 657 (9th Cir. 2017), and is thus law of the case. Plaintiffs' expert performed that analysis, determining that 27.20% of the value of the "natural" premium on the price of Wesson Oils was attributable to the GMO-free meaning of "natural" in the minds of Wesson Oil purchasers, which would be approximately $0.102 per unit purchased. *See* ECF No. 652-4 ¶¶29-35. The Ninth Circuit only criticized Mr. Weir's testimony as it pertained to the valuation of the settlement's proposed injunctive relief, *Briseño v. Henderson*, 998 F.3d at 1029, *not* his calculation of individual class member damages. Accordingly, Plaintiffs' prior assertion that the settlement's $0.15 per-unit compensation is 36% higher than class members could have obtained at trial, ECF No. 652 ¶¶19, remains accurate.

file claims for more than 30 Wesson Oil units. *See* Settlement Agreement, ECF No. 652-1 ("S.A."), §§3.1, 3.3.

During the pendency of this litigation, Conagra removed the "natural" claim from the labels of Wesson Oil Products and stopped marketing, advertising, and selling Wesson Oil Products as "natural." The Parties agreed to injunctive relief as part of their settlement, S.A.§§8.2.1 through 8.2.4, and although Magistrate Judge McCormick proposed that such injunctive relief would be valued at $27 million (ECF No. 739 ¶14), Plaintiffs are not asking the Court to ascribe *any* value to the proposed injunctive relief.[3]

The settlement represents an excellent recovery for the settlement class, as confirmed by the fact that only one settlement class member requested to opt-out of the settlement class, and only one settlement class member—who previously served as an expert witness for Objector's counsel—objected to the settlement.[4]

III. ARGUMENT

"Rule 23(e) imposes on district courts an independent obligation to ensure that any class settlement is 'fair, reasonable, and adequate,' accounting for the interests of absent class members." *Briseño v. Henderson*, 998 F.3d at 1022 (quoting Fed. R. Civ. P. 23(e)(2)). "Likewise, [courts]

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[3] Conagra consummated its sale of the Wesson brand to Richardson International, a Canadian company, on February 25, 2019—after the parties had agreed to settle the case. ECF No. 739 ¶18. As a result of that sale, the Parties revised the terms of the injunctive relief to clarify that it will apply to Conagra in the event it reacquires the Wesson brand. Class counsel previously submitted the Declaration of Larry Kopald to the Court, supporting their assertion that it was likely Richardson would not restore the allegedly false "100% Natural" claim to the Wesson Oil packaging, thus confirming the ongoing material value of the label change and concomitant injunctive relief provided by this settlement to Plaintiffs and the other settlement class members. Lest there be any doubt: although Magistrate Judge McCormick proposed that the injunctive relief be valued at $27 million based upon his analysis and the analysis of Plaintiffs' expert, and in order to avoid briefing related to Plaintiffs' "catalyst theory" of damages, Plaintiffs do not seek to proscribe any value to the injunctive relief.

[4] *See* ECF No. 672 at 3-8 (Mr. Henderson filed a claim and his objection on August 6, 2019—the last day for filing objections, and previously served as a paid expert for Mr. Frank); ECF No. 661-2 ¶¶ 18-21, pp. 95-96.

recognize 'an independent obligation to ensure that [any attorneys' fee] award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount.'" *Id.* (quoting *In re Bluetooth*, 654 F.3d at 941, and *Staton v. Boeing Co.*, 327 F.3d 938, 960-64 (9th Cir. 2003)).

In December 2018, Congress and the Supreme Court amended Rule 23(e) to set forth specific factors to consider in determining whether a settlement is "fair, reasonable, and adequate," including:

> 23(e)(2)(C): [Considering 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).[5]
>
> 23(e)(2)(D): the proposal treats class members equitably relative to each other.

Fed. R. Civ. P 23(e)(2)(C)-(D). The Ninth Circuit, in examining the 2018 Amendments, determined that the new Rule 23 language requires courts to "scrutinize[e] [a settlement's] fee arrangement for potential collusion or unfairness to the class" and that, in order to do so, "district courts must apply the *Bluetooth* factors to scrutinize fee arrangements—even in post-certification settlements—to determine if collusion may have led to class members being shortchanged." *Briseño v. Henderson*, 998 F.3d at 1026. Under *Bluetooth*, the Ninth Circuit identified three "subtle signs that class counsel have allowed pursuit of their own self-interests. . . to infect the negotiations." *Id.* at Those "signs" or "factors" are: "(1) when class counsel receives a disproportionate distribution of the settlement; (2) when the parties negotiate a 'clear sailing agreement' under which the defendant agrees not to challenge a request for an agreed-upon attorney's fee; and (3) when the agreement contains a 'kicker'

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[5] Plaintiffs have not included a discussion of "any agreement required to be identified," because they are unaware of and have not made any side agreements not part of the Settlement Agreement.

or 'reverter' clause that returns unawarded fees to the defendant, rather than the class." *Id.* (cleaned up).

Although the Ninth Circuit noted that this settlement raised "red flags" implicating each of the three *Bluetooth* factors, *it also held that those red flags, standing alone, did not constitute a basis for reversal*:

> We stress that nothing in this opinion suggests that courts should unnecessarily meddle in class settlements negotiated by the parties or that courts have a duty to maximize the settlement fund for class members. Far from it. We instead follow the rules of our involvement in the class action process as set by Congress. Under those rules, the parties can agree on any "fair, reasonable, and adequate" settlement amount. Fed. R. Civ. P. 23(e). *Nor do we seek to make any of the identified signs of collusion an independent basis for withholding settlement approval. Disproportionate fee awards, clear sailing agreements, and kicker clauses all may be elements of a good deal.* But, as we explained in Bluetooth, they may also signal a collusive settlement, and district courts must scrutinize them where they appear. . . . The district court thus should give a hard look at the settlement agreement to ensure that the parties have not colluded at class members' expense.

Briseño v. Henderson, 998 F.3d at 1027-28.

The Ninth Circuit's directive to this Court on remand is narrow[6]: ensure that the Parties did not collude with one another at the class members' expense, taking into account the "red flag" *Bluetooth* factors, as well as the 2018 Amendments to Rule 23. Accordingly, this brief addresses the Rule 23(e)(2)(C)(iii) and *Bluetooth* factors and then, for the avoidance of any doubt, the remaining

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[6] "[T]he district court[] has no power to expand [a] remand beyond the boundary ordered by [the] court. This is consistent with the orderly administration of justice." *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1173 (9th Cir. 2006); *Mirchandani v. United States*, 836 F.2d 1223, 1226 (9th Cir. 1988) (holding district court bound by scope of remand where "there is some threatened disruption of the judicial system's orderly operation").

Rule 23(e)(2) factors courts consider when granting final approval as well as awarding fees, costs, and service awards.

A. The *Bluetooth* Factors and Rule 23(e)(2)(C)(iii) Issues Identified for Remand

1. Rule 23(e)(2)(C)(iii): The relief provided for the class is adequate, taking into account the terms of any proposed award of attorney's fees, including timing of payment.

Magistrate Judge McCormick's proposal, which the Parties accepted after extensive negotiations and notwithstanding the substantial reduction of Plaintiffs' counsel's total accrued lodestar and expenses after eight years of contentious litigation (*see* Joint Decl. ¶¶252-254), provides that Conagra will pay attorneys' fees and costs—*separate from and in addition to* the benefits provided by the settlement to class members—awarded by the Court in a total amount not to exceed $6,850,000. *See* ECF No. 739 ¶14. The settlement provides for recovery by claimants that *exceeds* potential recovery at trial in an uncapped, claims-made settlement. *See* Exhibit A (July 19, 2021 Hrg. Tr. at 27:4-16 (describing the uncapped settlement with a robust notice program)). Meanwhile, the proposed fee and expense award—which was the result of Judge McCormick's mediation skills and efforts—equated to approximately 50% of the accrued lodestar and expenses of plaintiffs' counsel. Although it is true that ultimately the mediator's fee proposal exceeded the payments to class members based upon the number of claims that were eventually filed, that fact was neither known nor should it have been imputed. *Id.* ("We had no idea how high claims were going to go. We didn't have a cap on that. It ended up being less than a million. It could have been 7-, 10 million. We had no idea what to expect on that, particularly given that the magistrate judge selected their claims adjuster, who had a very robust claims program and notice program"). Moreover, the record demonstrates that the "red flags" identified by the Ninth Circuit pursuant to *Bluetooth* and Rule 23(e)(2)(C) do not *per se* invalidate the settlement.

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a. The Ninth Circuit was clear: the appearance of *Bluetooth* factors does not make a settlement *per se* unreasonable because there is no rule on absolute proportionality.

4 The Ninth Circuit acknowledged in its opinion that "[d]isproportionate fee awards, clear 5 sailing agreements, and kicker clauses all *may be elements of a good deal*," but that the Court needed 6 to "scrutinize them" upon remand pursuant to the Ninth Circuit's *Bluetooth* opinion. *Briseño v.* 7 *Henderson*, 998 F. 3d at 1027 (emphasis added). Importantly, and contrary to the Objector's 8 assertions, the Ninth Circuit *did not* say that the appearance of *Bluetooth* factors renders those 9 settlements *per se* unreasonable (otherwise it would have simply remanded with instructions to 10 invalidate the settlement). *Compare Briseño v. Henderson*, 998 F.3d at 1019 (noting issues "begging 11 for further review"), 1023 n.1 ("the district court on remand should review the settlement structure to 12 determine whether to apply common fund principles to its Rule 23(e) inquiry"), 1027-28 ("[t]he 13 district court thus should give a hard look at the settlement agreement to ensure that the parties have 14 not colluded at the class members' expense"); *with* ECF No. 666 at 2 (Objector argued that "the 15 insulated, disproportionate fee request renders the settlement unfair"), 10 (Objector argued that 16 "disproportionate fees render the entire Settlement unfair"). In fact, following the remand order, the 17 Objector sought "clarification" from the Ninth Circuit, arguing that Panel should revise its opinion to 18 preclude this Court from further analyzing the settlement or accepting additional information to do 19 so, and instead state that the "settlement is unacceptable and should be rejected on remand." *See* ECF 20 No. 725-2. More specifically, the Objector requested that the Ninth Circuit issue an opinion defining 21 "collusion" as "requir[ing] courts to reject [] settlements unless the settling parties could show that it 22 was impossible to provide a less disproportionate allocation to the class." *Id.* at 6. The Panel *rejected* 23 the Objector's attempt to rewrite the remand order, and summarily denied the Objector's motion 24 several days later without briefing from the Plaintiffs. See ECF No. 725-3.

25 That is because there is no rule requiring proportionality—especially in a case, like this one, 26 where further litigation would almost certainly not result in a better outcome for the class. *See, e.g.,*

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1 *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1126 (9th Cir. 2020) (finding that class counsel had not
2 "bargained away" better relief, because the district court had already limited the amount of relief
3 available). The amount of per-unit damages to which class members would be entitled is already the
4 law of the case—*see* fn. 3—and the Court has already cast doubts as to the future viability of this
5 litigation given the changing legal landscape. *See* Exhibit A (July 19, 2021 Hrg. Tr. 28:16-20 (calling
6 the settlement a "great result for the Class" considering the significant litigation challenges Conagra
7 would bring had the case not resolved)).

8 The remand order is clear: the Court must scrutinize the fee arrangement for potential
9 collusion or unfairness under Rule 23(e)(2)(C)(iii). The remand order does *not* transform the three-
10 part test established in *Bluetooth* into an ironclad rule demanding absolute proportionality in
11 contravention of already-established fee-shifting statutes. *See In re Bluetooth*, 654 F.3d at 945 ("we
12 *cannot say* the disproportion between the fee award and the benefit obtained for the class *was per*
13 *se unreasonable*") (emphasis added); *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1060 (9th Cir.
14 2019) ("disproportionate attorneys' fee does not mean the settlement cannot still be fair, reasonable,
15 or adequate").

16 **b. Creating a *per se* proportionality rule would threaten the purpose**
17 **of fee-shifting statutes.**

18 The Ninth Circuit's refusal to adopt a rule requiring absolute proportionality is significant
19 because it ensures that fee-shifting statutes continue to have the same effect as legislatures intended.
20 As this Court recently observed:

21 > What also struck me at the time is Congress has said, under these
22 > advertising/marketing laws, that you can bring class actions, but there are certain
23 > areas where I feel you're going to have a situation where the attorneys' fees are
24 > going to be more than what the class gets, and this is one of them. . . . But how am
25 > I going to have a trial on that? And how are plaintiffs' attorneys ever going to want

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1 to take these cases if they just get a few cents on the dollar for all the attorneys'
2 fees and the time and effort that they incurred in this area.

3 Exhibit A (July 19, 2021 Hrg. Tr. at 13:14-15:17). Especially in a long-pending case such as this one, 4 where the parties agree that the case "has been one of the most aggressively. . . prosecuted [and] 5 defended case[s]" in which they have been involved, *id.* at 8:21-23, fee-shifting statutes contemplate 6 that attorneys' fees may very well be larger than individual recoveries. *See In re GMC Pick-Up Truck* 7 *Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995) ("in statutory fee shifting cases . . . the 8 lodestar assures counsel undertaking socially beneficial litigation (as legislatively identified by the 9 statutory shifting provision) an adequate fee irrespective of the monetary value of the final relief 10 achieved for the class"); *Hayward v. Ventura Volvo*, 108 Cal. App. 4th 509, 512 (2003) (noting in a 11 consumer statutory fee-shifting case that "[t]o limit the fee award to an amount less than that 12 reasonably incurred in prosecuting such a case, would impede the legislative purpose underlying [the 13 statute]").

14 This does not mean that an attorney must go to trial to recover those fees; settlements are 15 possible—they just need to be scrutinized in accordance with *Bluetooth*. *See Briseño v. Henderson*, 16 998 F.3d at 1026 ("disparity in distribution of funds between class members and their class counsel 17 raises an urgent red flag demanding more attention and scrutiny").

18 Class counsel pursued several claims based upon fee-shifting statutes,[7] and it would be 19 appropriate to consider that, in certain circumstances such as this case—when the parties extensively 20 litigated every procedural stage, inclusive of substantive motions and appeals, as well as intense and 21 complex fact and expert discovery, over the course of eight years—the fees may be larger than class 22 recovery. Here, every class member (about 15 million in total) who submitted a claim was entitled—

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24 [7] *E.g.,* California Consumer Legal Remedies Act § 1780(e); Colorado Revised Statutes Title 6. 25 Consumer and Commercial Affairs § 6-1-1113; Florida Deceptive and Unfair Trade Practices Act §521.2105; Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/10a(c); New York Gen. Bus. Law § 349(h); Ohio Consumer Sales Practices § 1345.09; Oregon Rev. Stat. § 26 646.638(3); Tex. Bus. & Comm. Code § 17.50(d).

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1 *without proof of purchase* but merely by submitting a claim—to $0.15 for each unit of Wesson Oil
2 purchased, up to 30 units. *See* S.A.§3.1. Thus, under the settlement, *Conagra committed itself to pay*
3 *up to approximately $67.5 million under the settlement without requiring any proof of purchase* (it
4 also agreed to pay up to an additional $585,000 for claims based upon certain state statutes for which
5 statutory damages may have been awarded at trial, *see id.* 3.1.2). Because the Court had severely
6 limited the damages that the class could recover at trial—allowing instead only a narrow premium
7 price basis for recovery (*see supra* fn.3)—the per-unit amounts that class members could recover
8 under the settlement were greater than what they could have recovered at trial. The fact that only a
9 fraction of the class ultimately submitted claims—despite the robust notice program to reach
10 consumers for a small household product relating to purchases from more than a decade ago and a
11 simple claims procedure—does not *retroactively* make this a limited fund settlement. Indeed, the low
12 claims rate is precisely why the fee-shifting cases hold that lodestar fees exceeding actual recoveries
13 are necessary to encourage counsel to vigorously prosecute small claims cases. *See, e.g., Evon v. Law*
14 *Offices of Sidney Mickell*, 688 F.3d 1015, 1033-34 (9th Cir. 2012) ("[W]here the monetary recovery
15 is generally small, requiring direct proportionality for attorney's fees would discourage vigorous
16 enforcement of the consumer protection statutes."); *Millea v. Metro-North R.R.*, 658 F.3d 154, 169
17 (2d Cir. 2011) ("The whole purpose of fee-shifting statutes is to generate attorneys' fees that
18 are *disproportionate* to the plaintiff's recovery.") (emphasis in original). Under controlling law, the
19 Objector cannot simply ignore the more than $68 million in settlement funds that Conagra made
20 available to the class and instead focus solely, and only with the benefit of hindsight, on the amount
21 actually claimed.[8] Moreover, there is no reason to believe that *more* class members in this case would
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23 [8] *See, e.g., Patel v. Trans Union, LLC*, No. 14-cv-00522-LB, 2018 WL 1258194, *6 (N.D. Cal. Mar. 11, 2018) ("Ninth Circuit precedent requires courts to award class counsel fees based on the total
24 benefits being made available to class members rather than the actual amount that is ultimately claimed."); *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) ("[T]he
25 district court abused its discretion in basing the fee on the class members' claims . . . rather than on a percentage of the entire fund or the lodestar.").
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have submitted a claim after a trial verdict, especially given that a trial verdict's claims process almost certainly would have required proof of purchase.

c. *Bluetooth* necessarily requires courts to examine whether collusion—explicit or subtle—has actually occurred.

The Ninth Circuit's *Bluetooth* opinion establishes that "explicit collusion" is not the only criteria under which courts should examine fee arrangements; "more subtle signs"[9] infecting negotiations may also be appropriate for heightened scrutiny. *Bluetooth*, 654 F.3d at 947.

For example, *In re Dry Max Pampers Litig*. ("*Pampers*"), makes clear that when faced with such disproportionality, "courts must carefully scrutinize whether [] fiduciary obligations have been met" because "if the fees are unreasonably high, the likelihood is that the *defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members* or less injunctive relief for the class than could otherwise have [been] obtained." *Pampers*, 724 F.3d 713, 718 (6th Cir. 2013) (emphasis added) (internal citations omitted). The exchange contemplated with criticism by *Pampers* is where counsel negotiate a higher fee *in exchange for* keeping payments to class members low. This is what the Ninth Circuit feared in the instant case. But nothing could be further from the truth: class counsel litigated this case for nearly a decade with strenuous opposition from Conagra at every turn. Magistrate Judge McCormick's declaration makes clear that *he* selected the notice and claims administrator, and that *he* proposed the attorneys' fee award. ECF No. 739 ¶¶11-16. Class counsel did not bargain for a higher fee in exchange for a lower payout—they accepted a mediator's proposal for half of their requested lodestar (which is now worth even less given the lapse of an additional two years and intense appellate motion practice) and the mediator determined what notice plan would be used. It is no surprise that Magistrate

[9] Any allegation of "self-interest" is not supported by the record. Class counsel accepted the mediator's proposal for half of their lodestar to get a better result for the class. Had class counsel had to litigate these issues, counsel fees and expenses would have continued to rise substantially. And, had Plaintiffs been successful, class counsel would have been well positioned to seek even more than the substantially discounted amount that Magistrate Judge McCormick proposed.

1 Judge McCormick, who was appointed by this Court to mediate this case, confirmed that the Parties
2 did not collude. *Id.* ¶ 20.

3 **d. The "clear sailing" and "kicker" clauses do not render the**
4 **settlement invalid.**

5 The Objector previously argued that class counsel had negotiated a "clear sailing" clause to
6 "insulate[] its negotiated fee." ECF No. 666 at 5. Combined with a "kicker" agreement, which he
7 argued would revert any fees not awarded by the Court "to the defendant. . . rather than the class'
8 recovery," *id.* at 12, the Objector argued that the negotiated terms "have the self-serving effect of
9 protecting class counsel by deterring scrutiny of the fee award. The combination ensures that the only
10 beneficiary of a fee reduction (the defendant, due to the kicker) cannot argue for reduced fees—
11 leaving *no one* with the both the [sic] incentive and ability to make those arguments." *Id.* (emphasis
12 original). The problem with Objector's argument is that it is made based upon an unfounded
13 accusation: that the Parties allegedly negotiated this term to protect class counsel's fees. As
14 Magistrate Judge McCormick made perfectly clear, the Objector's assertion is false. "[M]y proposal.
15 . . [was] Plaintiffs' counsel would agree to seek and ConAgra would agree not to oppose attorney's
16 fees and expenses of $6,850,000." ECF No. 739 ¶14. He also made clear that this proposal was only
17 made after the Parties had negotiated the material "buckets" of available settlement relief. *Id.* ¶¶10-
18 14.

19 "One of the main criticisms of clear sailing provisions is that they represent prima facie
20 evidence of simultaneous negotiations of merit relief and fees, which is a practice fraught with serious
21 ethical concerns for lawyers representing the class." William D. Henderson, *Clear Sailing*
22 *Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 814
23 (2003). Perhaps that is why the Objector also argued that "[t]his Settlement demonstrates that
24 defendant is willing to pay at least $8 million to make this case go away," and that it did not matter
25 to Conagra whether the money went to class counsel or the settlement fund. ECF No. 666 at 13. This
26 is also demonstrably incorrect. Conagra's counsel stated—numerous times—that it would not agree
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to give the class a "windfall" much larger than the calculated damages. *See, e.g.,* Exhibit E (Oct. 7, 2019 Hrg. Tr. 28:4-16 ("Conagra, in negotiating the settlement, was very concerned about—we called them buckets—what each bucket of the settlement was and how much money went to each bucket. Conagra never said, 'Here's $8 million. You guys figure out how you want to divvy it up.' That's just not the way this happened, and that would not be anything Conagra would ever entertain here.")); Exhibit A (July 19, 2021 Hrg. Tr. 32:10-33:6 (stating that Conagra cares about the allocation of settlement funds)). There is absolutely no evidence in the record that the class would have gotten more had Conagra violated the mediator's proposal and opposed class counsel's requested fee. *Cf. Campbell*, 951 F.3d at 1127 ("We conclude that the evidence is insufficient to prove that the class would have gotten meaningfully more injunctive or declaratory relief if Facebook had merely been permitted to oppose class counsel's fee application, which Facebook already knew would be requesting substantially less than what class counsel represented would fully compensate them.").

When "clear sailing" and "kicker" provisions are included as part of a settlement, the Court is required to "examine the negotiation process with even greater scrutiny than is ordinarily demanded" to ensure the class's interests are protected. *Roes*, 944 F.3d at 1056. Here, the Court has a declaration directly from the mediator as to the timeline of the negotiations, as well as statements that the Parties *did not negotiate these terms* but that they were mediator proposals because the Parties could not agree on fees. ECF No. 739 ¶¶13-14. The record supports neither collusion nor the promotion of self-interest; the "clear sailing" and "kicker" provisions do not violate *Bluetooth* or Rule 23(e)(2)(C)(iii).

e. Magistrate Judge McCormick's fee proposal was not reached by collusion, and is not an effort to "sell out" the class.

Class counsel previously sought payment of the mediator's recommendation of approximately half of their lodestar based upon the factors outlined in *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-1050 (9th Cir. 2002); and *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). As outlined in Joint Declaration and explained herein, (1) the results achieved;

(2) the duration and historical record of the case; (3) the complexity of the case; (4) the risk of litigation; (5) the skill required and the quality of work; (6) the contingent nature of the fee; and (7) awards made in similar cases support payment of class counsel's requested fee. *See also* ECF Nos. 662, 663.

Because Plaintiffs pursued claims under statutes with fee-shifting provisions, the Court may apply the lodestar method, instead of the common fund doctrine, to calculate and evaluate attorneys' fees. *See In re Bluetooth*, 654 F.3d at 941 ("The 'lodestar method' is appropriate in class actions brought under fee-shifting statutes"); *Corzine v. Whirlpool Corp.*, No. 15-cv-05764, 2019 WL 7372275, at **10-12 (N.D. Cal. Dec. 31, 2019) (finding lodestar approach appropriate for calculation of attorneys' fees in fee-shifting cases); *Edwards v. First American Corp.*, No. CV 07-03796, 2016 WL 8943464, at *14 (C.D. Cal. June 20, 2016) (finding lodestar method based upon fee-shifting statute appropriate, finding a fee request of 90% of attorneys' lodestar "reasonable under the circumstances" given the "decade-long history of this case, which has involved significant discovery and motions practice"), 2016 WL 8999934 (C.D. Cal. Oct. 4, 2016) (making further analysis on final approval).

Over two years ago, class counsel's fee request was approximately 50% of their lodestar. ECF No. 662 at 4. That percentage is lower, now, given the substantial amount of briefing generated as a result of Objectors' arguments—including a motion for sanctions before this Court (which was denied, later appealed, and then voluntarily dismissed on the day the Objector's merits brief was due, ECF Nos. 711, 713; Joint Decl. ¶¶213-218, 247, 249) as well as a motion for sanctions before the appellate court (which was also denied). *See Briseño v. Henderson*, 998 F.3d at 1031, n.6; Joint Decl. ¶¶221, 235. Class counsel dedicated more than 20,319.65 hours (as of July 20219), for a total lodestar of $11,498,806.80 (based upon then-current rates), with expenses of $978,671.10. Joint Decl. ¶¶244, 248-250. Each firm that worked on this case submitted an affidavit, detailing the time, hourly rates, and expenses for those firms. *Id.* ¶¶237-243. The hourly rates, to which no one has previously objected, are consistent with other rates that have been approved by Courts in this Circuit. *See*

Corzine, 2019 WL 7372275, at **11-12 (collecting cases). Importantly, regardless of the attorneys' hourly rates, *the lodestar has already been reduced by half.*

The amount of time spent on the case was reasonable and necessary; class counsel did not "frit[] away hours on pointless motions or unnecessary discovery," nor did they "achieve[] very little for the class," *Briseño v. Henderson*, 998 F.3d at 1026. As Conagra's counsel observed, the case was aggressively prosecuted *and* defended. Exhibit A (July 19, 2021 Hrg. Tr. at 8:21-25). And Plaintiffs' aggressive litigation strategy was necessary. As the Joint Declaration details, Conagra attempted to stay the case on numerous occasions, and Plaintiffs won each time (¶¶12-21, 44-46, 139); the parties engaged in extensive written and oral discovery (¶¶47-164), requiring briefing on multiple motions to compel (on which Plaintiffs had a fair amount of success ¶¶ 98-105, 145, 150, 160); and Plaintiffs were able to certify eleven statewide classes, successfully defending against Conagra's appeal (wherein it sought to create an "ascertainability" standard in the Ninth Circuit), and successfully defending that decision in briefing before the United States Supreme Court, resulting in a denial of Conagra's petition for writ of *certiorari*. *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919 (C.D. Cal. 2015); *Briseño v. ConAgra Foods, Inc.*, 674 Fed. Appx. 654 (9th Cir. 2017); *Briseño v. ConAgra Foods, Inc.*, 844. F3d 1121 (9th Cir. 2017), *cert. denied* 138 S. Ct. 313 (2017). Given the "great result for the class" that class counsel was able to achieve, Exhibit A (July 19, 2021 Hrg. Tr. at 28:16-20), the fee request is more than reasonable.

B. Factors Not Identified for Scrutiny on Remand

1. Rule 23(e)(2)(A): The class representatives and class counsel have adequately represented the class.

Plaintiffs sought relief under various common law and statutory claims, including claims brought under fee-shifting statutes such as the California Consumer Legal Remedies Act § 1780(e); Colorado Revised Statutes Title 6. Consumer and Commercial Affairs § 6-1-1113; Florida Deceptive and Unfair Trade Practices Act §521.2105; Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/10a(c); New York Gen. Bus. Law § 349(h); Ohio Consumer Sales Practices §

1345.09; Oregon Rev. Stat. § 646.638(3); and Tex. Bus. & Comm. Code § 17.50(d). The Court certified eleven state-wide litigation classes (California, Colorado, Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon, South Dakota, and Texas), finding that Plaintiffs satisfied the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(3). ECF No. 545. The Ninth Circuit affirmed. *See Briseño v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017); *Briseño v. ConAgra Foods, Inc.*, 674 F. App'x 654 (9th Cir. 2017). And on October 10, 2017, the Supreme Court of the United States denied Conagra's petition for writ of *certiorari*. *Conagra Brands, Inc. v. Briseño*, 138 S. Ct. 313 (2017).

The Joint Declaration further supplements the record and makes clear that class counsel dedicated significant time and resources to the litigation—which involved briefing regarding preemption, numerous *ex parte* applications by Conagra to stay the case (including but not limited to pending referral to the Food and Drug Administration), rounds and rounds of briefing related to discovery (including motions to compel filed by Plaintiffs), two full rounds of class certification briefing, and Plaintiffs' success on Conagra's attempts to reverse the district court's decision granting class certification—at both the Ninth Circuit and Supreme Court. *See* Joint Decl. ¶6. Plaintiffs' primary objective in this litigation was achieved when—after this litigation began—Conagra decided to remove the "100% Natural" claim from Wesson labels, and stopped its decades-long practice of marketing Wesson Oils as "natural." *Id.* ¶10 n.1.[10] The parties were on the eve of trial when this settlement was negotiated, *see* ECF Nos. 640, 641, with Plaintiffs and class counsel having achieved a significant number of material victories in the litigation. The Court previously found that class

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[10] Plaintiffs contend that Conagra's decision was due, at least in part, to this litigation, and is further evidence of the merits of Plaintiffs' claims. Conagra denies this litigation contributed in any way to its decision to drop the 'Natural' claim from Wesson Oils. Due to the timing of Conagra's decision and the parties' agreement to enter mediation immediately after Conagra had exhausted its appeals of Judge Morrow's class certification ruling, Plaintiffs did not had an opportunity to seek a ruling that this litigation was a "catalyst" in that decision.

1 counsel and the Plaintiffs fulfilled Rule 23(a)(4) adequacy's requirement. *In re ConAgra Foods, Inc.*,
2 90 F. Supp. 3d at 975-76. Notably, this issue was not flagged by the Ninth Circuit for remand, and
3 there is no reason now to disturb the Court's prior ruling—which was previously upheld on appeal.

4 **2. Rule 23(e)(2)(B): The settlement was negotiated at arm's length.**

5 The settlement here is the product of extensive arm's-length and adversarial settlement
6 discussions, including two separate, extended rounds of mediation before two neutrals—each of
7 which spanned over months. As the declaration of Magistrate Judge McCormick made clear: "I saw
8 nothing in the parties' conduct before me to indicate that they were colluding at the class members'
9 expense. . . . Nearly every settlement term discussed in this declaration was the result of several
10 rounds of proposals and counter-proposals. And several of the final terms, including attorney's fees,
11 were resolved only after I made a proposal." ECF No. 739 ¶20. The Parties did not commence
12 discussion of attorneys' fees until agreement on all substantive portions of the class resolution had
13 been reached. And when they could not reach an agreement on attorneys' fees, the Parties accepted a
14 "mediator's proposal" offered by Magistrate Judge McCormick. *Id.* ¶¶12-14.

15 Both Conagra's counsel and class counsel explained to the Court that it would have been
16 impossible for them to collude, because the parties vigorously fought throughout the pendency of the
17 litigation and could agree on little. *See* Exhibit A (July 19, 2021 Hrg. Tr. at 8:16-25 (noting the Parties'
18 extensive disagreements)). There can be no doubt from the record in this case, and the Court should
19 reaffirm its conclusion, that the settlement was negotiated at arm's length.

20 **3. Rule 23(e)(2)(C)(i): The relief provided for the class is adequate, taking**
21 **into account the costs, risks, and delay of trial and appeal.**

22 Plaintiffs assert there is abundant evidence that the "100% Natural" claim, which appeared on
23 every bottle of Wesson Oil sold during the applicable class periods, was material to consumers, that
24 consumers interpreted the claim to mean that the products did not contain GMOs, and that every class
25 member paid a premium price for Wesson Oils due to the presence of the "100% Natural" claim on
26 the label. While Plaintiffs believe that there is sufficient evidence for their claims, the risks of
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1 proceeding forward, especially considering the strength of the proposed settlement recovery, supports
2 Plaintiffs' renewed request for final approval.

3 Regardless of the parties' evaluations of the strength of Plaintiffs' case, this settlement
4 includes monetary relief for class members that is approximately *36% higher* than they could have
5 obtained at trial. *See supra* n.2; ECF No. 652 at ¶¶18-19. Indeed, the Court has since cast doubt on
6 the likelihood of success on Plaintiffs' claims, especially considering the recent, changing legal
7 landscape, which seemed to be favoring Conagra. *See* Exhibit A (July 19, 2021 Hrg. Tr. at 14:18-
8 22). Based on the foregoing considerations, "it is plainly reasonable for the parties at this stage to
9 agree that the actual recovery realized and risks avoided here outweigh the opportunity to pursue
10 potentially more favorable results through full adjudication." *Dennis v. Kellogg Co.*, 09-CV-1786-L
11 (WMc), 2013 WL 6055326, at *3 (S.D. Cal. Nov. 14, 2013).

12 While Plaintiffs believe their case is a strong one, the complexity and risk of further litigation
13 are substantial, and it is unclear whether there would be any recovery at all for the class members in
14 the eleven certified state classes. Should litigation continue, more expense and complexity could
15 result, because Plaintiffs would request information regarding Conagra's label and marketing change
16 in 2017, for Conagra to update past document productions, and for the parties to resolve issues
17 surrounding Conagra's productions of documents just preceding the close of fact discovery in 2015.
18 Joint Decl. ¶191. With the case at the eve of trial, as with all other phases in this litigation, Conagra
19 would have mounted a vigorous defense to Plaintiffs' claims, likely would have moved to decertify
20 the state-wide classes, and would have continued to challenge Plaintiffs' price premium damages
21 methodology. *See* Exhibit E (Oct. 7, 2019 Hrg. Tr. at 16:25-17:7 (Conagra's counsel explaining that,
22 had litigation continued, Conagra would have filed a motion to decertify the classes, a motion for
23 summary judgment, and then a motion to sever the different state classes and transferring them to
24 their original states, requiring separate trials)). Additional risks of continuing this litigation include
25 further motion practice and a possible adverse outcome at trial. The relief obtained through this
26 settlement, balanced against the length, expense, and uncertainty of further litigation, weighs in favor
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of approval. *See Briseño v. Henderson*, 998 F.3d at 1031 (noting the "strong judicial policy favor[ing] settlements, particularly where complex class action litigation is concerned") (quotations omitted).

4. Rule 23(e)(2)(C)(ii): The relief provided for the class is adequate, taking into account the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims.

As Magistrate Judge McCormick detailed in his declaration to the Court, he selected the settlement's notice plan and claims administrator (ECF No. 739 ¶14), which ended up being "the Plaintiffs' proposal, t*he more robust claims notice program*." Exhibit A (July 19, 2021 Tr. at 24:9-15)(emphasis added). Although the Ninth Circuit did not direct the Court to scrutinize this issue on remand, such that it should not be up for review, Plaintiffs detail for the Court both the Notice Plan and claims administration process selected by Magistrate Judge McCormick as part of their renewed motion.

The Court already determined that the form of the notice was proper and approved the Long Form Class Notice, the Publication Notice, and the Notice Plan. *See* ECF No. 655 at 8-9. In determining whether a notice plan, as implemented, is fair, adequate, and appropriate, it is not necessary that every settlement class member receive actual notice to meet due process considerations, as long as the notice is "reasonably certain to inform the absent members of the plaintiff class." *Destefano v. Zynga, Inc.*, No. 12-CV-04007-JSC, 2016 WL 537946, at *6 (N.D. Cal. Feb. 11, 2016) (quoting *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994)). "The manner of notice need not be perfect." *Id*. at *7; *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947 (9th Cir. 2015) ("The notice in this case was not perfect, but the court did not abuse its discretion in approving the notice plan and ultimately approving the settlement.").

The Parties implemented notice in accordance with the Court-approved terms. Notice was robust and comprehensive, and created to target Conagra's customers, specifically, based upon data used to analyze demographic and media usage for households in the eleven, certified statewide classes

1 that purchased Wesson Oil. *Id.* ¶15. Notice of the settlement was disseminated via, among other
2 efforts, the leading digital network (Google Display Network), the top social platform (Facebook),
3 print media (*People* magazine), and a nationwide press release. *See* ECF No. 652-1 at ¶¶7-11. The
4 settlement website, www.WessonOilSettlement.com, includes links to relevant documents and
5 pleadings, the Claim Form, the Long-Form Class Notice, and frequently-asked questions (including
6 information on how to opt-out, object and appear at the fairness hearing), and a toll-free number that
7 provided information about the settlement. *Id.* at ¶¶13-15. Using demographic data specific to the
8 settlement class,[11] the claims administrator anticipated reaching at least 70% of the class on average
9 of at least 2.6 times each. ECF No. 652-1 at 94.

10 Indeed, the notice's effectiveness was supported by a declaration by Jennifer Keough, the
11 Chief Executive Officer of JND Legal Administration LLC. *Id.*[12] Ms. Keough based her declaration
12 upon twenty years of legal experience creating a supervising notice and claims administration
13 programs, having personally overseen well over 500 matters. *Id.* ¶2. JND has overseen many,
14 different matters in the Ninth Circuit, as described in Ms. Keough's declaration. *Id.* ¶8. Ms. Keough,
15 herself, has been recognized by courts across the country via affidavits attesting to JND's role in the
16 creation and launch of various media programs, which have been regularly approved by courts
17 throughout the United States. *Id.* ¶11.

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19 [11] JND used GfK Mediamark Research & Intelligence, LLC ("MRI") data to analyze this demographic information. MRI is a nationally-accredited research firm that provides consumer
20 demographics, product and brand usage, and audience/exposure in all forms of advertising media. *Id.* ¶15, n.2. Based on a yearly face-to-face interview of 26,000 consumers in their homes, MRI's Survey
21 of the American Consumer™ is the primary source of audience data for the U.S. consumer magazine industry and the most comprehensive and reliable source of multi-media audience data available. *Id.*
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[12] The Objector did not challenge Ms. Keough's declaration in connection with his objection.
23 *Compare* ECF Nos. 666 at 1, 7, 9-10 (criticizing declaration of Colin B. Weir), and 18 n.12 (criticizing declaration of Larry Kopald); 684 (moving to strike the expert testimony of Mr. Weir); 693 (reply in
24 support of Objector's motion to strike expert testimony of Mr. Weir); 685 at 8 (noting, erroneously, that Plaintiffs' expert's damages calculation was manufactured for "rhetorical convenience" for the
25 settlement). Accordingly, that argument is waived and is not a remand issue.

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As Rule 23(c)(2) requires, the notice informed class members of the claims alleged in the action, the definition of the certified settlement class, the settlement terms, the scope of the release, and their rights as members of the settlement class to opt out of or otherwise object to the settlement, including Plaintiffs' request for attorney's fees, expenses, and service awards, and their right to request exclusion from the class. The notice fairly apprised class members of the settlement and their options in accordance with Rule 23(c)(2) and due process. Using demographic information, JND relied heavily on digital notice,[13] with some print notice to target individuals who no longer resided in the eleven certified classes. *Id.* ¶17. Ms. Keough's declaration stated that the Notice Plan was the best notice practicable under the circumstances, was consistent with the requirements of Rule 23 and all applicable court rules, and was consistent with other similar court-approved notice programs. *Id.* ¶29. Therefore, the Court should again find that notice was given to settlement class members by the best means "practicable under the circumstances." Fed. R. Civ. P. 23(c)(2).[14]

JND also serves as the claims administrator and is responsible for distributing settlement proceeds to class members. The distribution, however, is made based upon a claims-made process, so payments will be made directly to claimants based upon information provided in the Claim Form.

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[13] *Briseño v. Henderson*, 998 F.3d at 1026 n. 3 ("We, however, do not hold that parties must provide direct notice, especially for low-cost items bought by millions of consumers. A contrary ruling would likely not be cost-effective, with administrative and notice costs devouring most of the settlement fund.").

[14] Aside from passing references to the lack of direct notice (*see* ECF Nos. 666 at 13 n.10) or claiming, without evidence, that "modest third-party discovery" could identify class members who purchased Wesson Oil *more than thirteen years before his objection was filed* in a reply brief (ECF No. 685 at 8), the Objector did not take issue with the mediator's selected Notice Plan. *See Briseño v. Henderson*, 998 F.3d at 1026, n.3 (noting that the Objector did not object to the lack of direct notice). The Objector claimed, without citation, that third-party discovery was used to increase claims in a separate settlement, but does not explain how such third-party discovery in *this* case would better incentivize class members to file claims in *this* case for a different amount of recovery. To the extent the Objector now shifts his argument to focus on notice, he has waived these previously-undeveloped arguments. *See, e.g., California v. Azar*, 911 F.3d 558, 573 n.1 (9th Cir. 2018) (finding single-sentence arguments unsupported by citations waived); *1940 Carmen, LLC v. City of Los Angeles*, Nos. 20-cv-06772 and 20-cv-08130, 2021 WL 340648, at *4 (C.D. Cal. Aug. 4, 2021) ("Perfunctory, undeveloped arguments without discussion or citation to pertinent legal authority are waived.") (quoting *Mahaffey v. Ramos*, 588 F.3d 1142, 1146 (7th Cir. 2009)).

See ECF No. 652-1 at 74-76. Within twenty days after the Final Effective Date, Conagra shall fund the Gross Settlement Proceeds used to pay valid claims, as set forth in the Settlement Agreement (§§2.18, 2.20), and no Gross Settlement Proceeds will revert to Conagra (§3.2).

5. The proposal treats class members equitably.

The settlement does not grant preferential treatment to any segment of the class. All class members may claim monetary benefits on a per-unit basis, and all class members stand to benefit from the injunctive relief. The settlement provides compensation to New York and Oregon class members due to the statutory damage provisions in their state consumer protection statutes that Plaintiffs contend they may recover, in an amount agreed after extensive arm's length negotiations and with the assistance of Magistrate Judge McCormick as mediator. The Ninth Circuit did not take issue with the treatment of class members relative to one another. Fed. R. Civ. P. 23(e)(2)(D).

6. Plaintiffs' service awards were not disturbed by the Ninth Circuit.

The Ninth Circuit did not disturb the Plaintiffs' service awards of $3,000 for each of the six Plaintiffs who were deposed, and $1,000 for each of the seven Plaintiffs who were not deposed, for a total aggregate service award amount of $25,000. All of the Plaintiffs have been supportive and involved in this lengthy litigation, including reviewing pleadings, responding to discovery requests, preparing for and testifying at depositions, communicating with counsel, and approving the terms of the settlement agreement. *See* ECF No. 663 ¶¶23-25; Joint Decl. ¶¶256-258. This Court already found that the requested service awards "are within the range of incentive awards typically approved by district courts" and that "the request for incentive awards is reasonable." *See* ECF No. 654 at 7. Plaintiffs respectfully request that the Court enter an order reaffirming the service awards.

IV. CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Court grant this Motion and enter an order finally approving the settlement, and granting Plaintiffs' request for fees, expenses, and service awards.

Respectfully submitted,

Dated: September 23, 2021

/s/ David E. Azar

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CERTIFICATE OF SERVICE

The undersigned certifies that, on September 23, 2021, he caused this document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of filing to registered counsel of record for each party.

Dated: September 23, 2021

/s/ David E. Azar
David E. Azar (SBN 218319)