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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

IN RE CONAGRA FOODS, INC.	Case No. CV 11-05379-CJC (AGRx) MDL No. 2291 **CLASS ACTION**

MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR ORDER DIRECTING NOTICE TO CLASS MEMBERS,

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I. INTRODUCTION

Plaintiffs in this action allege that from at least June 27, 2007 until July 1, 2017, Conagra deceptively and misleadingly marketed its Wesson brand cooking oils, made from genetically-modified organisms ("GMO"), as "100% Natural." After almost eight years of hard-fought litigation, in order to avoid the risks, burden, and cost of ongoing litigation, Class Representatives and Conagra have reached agreement to resolve this action on a class-wide basis. The settlement provides both injunctive relief and monetary damages to all Class members.

In July 2017, six years into this litigation, Conagra removed the "100% Natural" claim from all Wesson labels, and stopped advertising the products as "natural." Plaintiffs contend that this litigation was a significant factor leading to Conagra's decision to institute labeling and marketing changes. Conagra contends its decision did not relate in any way to this litigation.

The settlement agreed to by the Parties in November 2018 included injunctive relief providing that Conagra would not label, advertise, or marketing Wesson Oils as "natural" absent future legislation or regulation permitting such a claim, thus guaranteeing that Conagra would not reverse labeling and marketing changes it adopted in 2017. The Parties, with the assistance of Magistrate Judge McCormick as mediator, agreed that the value of the injunctive relief was $27,000,000. Approximately one month later, Conagra announced that it had agreed to sell the Wesson brand to Richardson International, a Canadian company. The sale was consummated on February 25, 2019. As a result of that sale, the Parties have revised the terms of the injunctive relief to clarify that it will apply to Conagra in the event it reacquires the Wesson brand.

The Settlement also provides the following monetary benefits to Class Members: (a) $0.15 for each unit of Wesson Oils purchased by members of each of the eleven Classes to Households submitting Valid Claim Forms (to a maximum of 30 units without proof of purchase, and unlimited units with proof of purchase), (b) an additional fund of $575,000 to be allocated to members of the New York and Oregon state classes who submit Valid Claim forms, as compensation for the statutory damages provided for in the consumer protection laws of those states which Plaintiffs contend apply,

and (c) an additional fund of $10,000 to compensate those in all Classes who submit valid proof of purchase receipts for more than thirty (30) purchases at $0.15 for each such purchase above 30; should $10,000 be insufficient to cover such claims, Class Counsel shall pay the non-funded claims from any attorneys' fees awarded in this case; should the $10,000 fund not be exhausted, the remaining funds will revert to category (b) herein for payment to the New York and Oregon state Classes. This settlement was negotiated at arm's length, with the assistance of Magistrate Judge Douglas F. McCormick.

Plaintiffs move the Court to find it will likely be able to approve this Settlement as fair, reasonable, and adequate under Rule 23(e)(2), to direct notice to the Classes pursuant to Rule 23 of the Federal Rules of Civil Procedure, and to appoint class representatives and class counsel.

II. THE ALLEGATIONS AND HISTORY OF THE LITIGATION

A. Plaintiffs' Allegations

From at least June 27, 2007 until July 1, 2017, every bottle of Wesson Oil carried a front label stating that the product was "100% Natural." Plaintiffs in this action, residents of eleven different states, allege that the "natural" claim on Wesson Oils was false and misleading because the products contain GMOs. During the course of this litigation, Conagra removed the "100% Natural" claim from all Wesson labels, and stopped advertising the products as "natural," as of July 1, 2017.

Plaintiffs further allege that Wesson Oils commanded a premium price due to the presence of the "100% Natural" claim on the label and, consequently, every Class Member was induced to pay more for Wesson Oils due to that false and deceptive claim. Accordingly, Plaintiffs brought this Action on behalf of themselves and other similarly-situated consumers seeking to end Conagra's use of the "100% Natural" claim and obtain monetary compensation for the Classes, *i.e.*, the price premium they allegedly paid for Wesson Oils due to presence of the "100% Natural" claim.

Conagra denies Plaintiffs' allegations and believes that it has a variety of meritorious defenses.

B. History of the Litigation

The Kelston/Levitt Declaration ("Kelston/Levitt"), submitted herewith, is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed

description of the history of the litigation, including among other things, the history of the Action; the nature of the claims asserted; the creation of the MDL, early proceedings and discovery, discovery class certification proceedings, appeals, and ancillary litigation.

C. Mediation and Settlement

On January 29, 2018, the parties held an all-day mediation session before the Honorable Edward A. Infante (Ret.), under the auspices of JAMS in San Francisco. Between January 29 and March 19, 2018, Judge Infante engaged in extensive correspondence and held numerous telephone conferences with each party but was ultimately unable to forge a settlement.

On June 8, 2018, this Court referred the parties to Magistrate Judge McCormick for further settlement discussions. Magistrate Judge McCormick met with both parties at that time and, after extensive correspondence and telephone conferences, Magistrate Judge McCormick held an another in-person settlement conference with the parties on August 30, 2018; no settlement was reached at that time. Magistrate Judge McCormick continued conferring with the parties and, in mid-October 2018, the parties reached agreement in principle regarding the monetary relief to Class Members and the provisions of injunctive relief. With Magistrate Judge McCormick's continued involvement, the parties then negotiated the value of the injunctive relief to Class Members, the amount of attorneys' fees Class Counsel would seek from the Court without Conagra's objection, and the selection of a Settlement Administrator. On November 13, the parties accepted a "mediator's proposal" on the value of injunctive relief and attorneys' fees issue. Magistrate Judge McCormick then accepted Settlement Administrator proposals from both sides and, on or about December 14, 2018, selected JND Legal Administration as the Settlement Administrator.

III. THE PROPOSED SETTLEMENT TERMS

The Settlement terms are set forth in the Agreement, which is attached as Exhibit 1 to the Kelston/Levitt Declaration. The following is a summary of the Settlement terms.

A. Notice to the Certified Classes

By the Court's Order Granting in Part and Denying in Part Plaintiffs' Amended Motion for Class Certification [ECF No. 545], eleven statewide classes were certified under Fed. R. Civ. P. 23(b)(3) to pursue various state law claims. S.A., §1.1. The parties presently move for an Order Directing Notice to the Classes ("Proposed Order") directing notice to the Classes certified under Fed. R. Civ. P. 23(b)(3), which were limited by the applicable statute of limitations periods established by the laws of the eleven states, of this proposed settlement and their rights under it.

The Proposed Order would also appoint Class Representatives for each of the eleven Classes,[1] and appoint DiCello Levitt Gutzler LLC and Milberg Tadler Phillips Grossman LLP as Class Counsel.

B. Benefits to the Class Members

1. Injunctive Relief, Label and Marketing Changes

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." Plaintiffs point to this change as a result achieved in the wake of this litigation, while acknowledging that this Settlement does not constitute an admission by Conagra of liability, damages, or any other issue in the lawsuit. Conagra asserts that its decision to drop the 'natural' claim from Wesson Oil labels had nothing to do with this litigation.

The Parties have agreed that, as part of the Final Approval Order, the Court will issue an injunction ordering that should Conagra reacquire the Wesson Oil brand:

- Conagra will not advertise, market or sell Wesson Oil Products labeled as "natural" unless the FDA issues guidance or a regulation, or federal legislation is enacted,

[1] (1) Robert Briseño and Michele Andrade for the California Class; (2) Jill Crouch for the Colorado Class; (3) Julie Palmer for the Florida Class; (4) Pauline Michael for the Illinois Class; (5) Cheri Shafstall for the Indiana Class; (6) Dee Hooper-Kercheval for the Nebraska Class; (7) Kelly McFadden and Necla Musat for the New York Class; (8) Maureen Towey for the Ohio Class; (9) Erika Heins for the Oregon Class; (10) Rona Johnston for the South Dakota Class; and (11) Anita Willman for the Texas Class.

permitting use of a "natural" claim on a product containing oil derived from genetically engineered seed stock.

- Conagra will not advertise, market, or sell Wesson Oil Products as "non-GMO" unless the claim is certified by an independent third-party certification organization.
- The Settlement does not preclude Conagra from making other changes to the advertising and marketing of Wesson Oil Products, provided that those changes do not conflict with the provisions of the Settlement.

The Parties agree that the value of the Injunctive Relief to the Classes is $27,000,000. S.A., §§8.2.1 through 8.2.4.

Plaintiffs estimate the aggregate value of the labeling and marketing changes, dating back to July 2017 and (for reasons explained below) extending one year into the future, to be approximately $30,600,000. Conagra contends its decision to institute label and marketing changes in July 2017 did not relate in any way to this litigation and therefore does not confirm or agree with Plaintiffs' valuation over and above the $27,000,000 agreed value of Injunctive Relief.

1. Gross Settlement Proceeds and Monetary Relief

In addition to the injunctive relief, the Settlement also provides for "Gross Settlement Proceeds" of (a) $0.15 per unit to Households in all Classes submitting Valid Claim Forms (with a maximum Household recovery of 30 units where no proof of purchase receipts for more than 30 units is submitted) (b) an additional fund of $575,000 to be allocated to New York and Oregon Class Members who submit Valid Claim forms, as compensation for the damages provided for in the consumer protection laws of those states the Plaintiffs would claim at trial, and (c) an additional fund of $10,000 to compensate those in all Classes who submit valid proof of purchase receipts for more than thirty (30) purchases at $0.15 for each such purchase above 30; should $10,000 be insufficient to cover such claims, Class Counsel shall pay the non-funded claims from any attorneys' fees awarded in this matter; should the $10,000 fund not be exhausted, the remaining funds will revert to category (b) herein for payment to New York and Oregon state Classes. As explained below at 16 (Monetary

Compensation to Class Members), the $0.15 per unit compensation is significantly more than the maximum Class Members could have received had they prevailed at trial. The Gross Settlement Proceeds shall be used to pay all Valid Claim Forms. S.A., §2.20.

C. Notice

The Settlement Agreement proposes that the Court appoint JND Legal Administration as the Settlement Administrator to administer the notice and claims process. JND provides class action administration and legal notice programs and JND and its principals have extensive experience administering class action settlements, many of them in this Circuit. Keogh Decl., ¶¶ 1-11.[2] JND was selected by Magistrate Judge McCormick based on a submission that included the proposed Notice Plan.[3] The proposed Notice Plan is described in Exhibit A-4 to the Agreement, and will consist of the following:

1. Print and Digital Publication Notice to Class Members

JND will direct a print effort in the national edition of a leading consumer magazine (People); a heavy digital effort geographically focused on the eleven Class States that includes the leading digital network (Google Display Network) and the top social platform (Facebook); newspaper notice placements in the Los Angeles Daily News to fulfill California's Consumers Legal Remedies Act (CLRA) notice requirements; an internet search effort on a top search engine site (Google); a press release that will be distributed to media outlets nationwide; and the establishment of a settlement website and toll-free phone number from which Class Members may receive additional information about the Settlement. The print and digital media effort alone is designed to reach 70% of likely Class Members on average 2.6 times each.[4] The CLRA notice placements, Internet search effort and the

[2] Additional information available at JND's website, http://www.jndla.com/ (last accessed Feb. 21, 2019).

[3] The decision of a court to give notice under Rule 23(e)(1) was previously referred to as "preliminary approval." See 2018 Advisory Committee Note., Subdivision (c)(2).

[4] Reach is defined as the net, unduplicated percent of Class Members who have an opportunity to be exposed to notice at least one time over the course of the notice campaign.

distribution of the press release will enhance reach beyond the estimated 70%. Keough Decl., ¶¶ 14, 26.

2. Settlement Website and Toll-Free Number.

JND will establish a Settlement Website, at the URL www.wessonoilsettlement.com. The Settlement Website will be optimized for mobile visitors so that information loads quickly on mobile devices and will also be designed to maximize search engine optimization through Google and other search engines. Keywords and natural language search terms will be included in the site's metadata to maximize search engine rankings. Visitors to the Settlement Website will have the ability to download a Claim Form or submit one electronically. Keough Decl., ¶¶ 23-24. JND will also establish and maintain a 24-hour, toll-free telephone number where callers can obtain information about the Settlement. Keough Decl., ¶ 25. The Settlement Website and toll-free number will be live beginning no later than one day before First Publication of Class Notice (S.A., §5.6.1)

D. Opt-Out and Objection Procedures; Separate Payment of Administrative Costs

Opt-out and objection procedures and the separate payment of administrative costs are detailed in the Kelston/Levitt Declaration at ¶¶ 66-68.

E. Separate Payment of Attorneys' Fees and Costs; Service Awards

Class Counsel will apply for an award of reasonable attorneys' fees and costs in a total amount not to exceed $6,850,000. Any attorneys' fees and costs awarded to Class Counsel will be paid by Conagra separate from and in addition to the benefits provided to Class Members. S.A., §8.1. Class Counsel represents that the mediated maximum amount for attorneys' fees and unreimbursed costs in this case of $6,850,000 are approximately 50% of Class Counsel's actual total combined lodestar and unreimbursed expenses. Kelston/Levitt ¶ 63.

Class Counsel will also request service awards of (a) up to $3,000 for each of the six Class Representatives who were deposed (Robert Briseño, Michele Andrade, Jill Crouch, Pauline Michael, Necla Musat, and Maureen Towey) and (b) up to $1,000 for each of the seven Class Representatives

who were not deposed (Julie Palmer, Cheri Shafstall, Dee Hooper-Kercheval, Kelly McFadden, Erika Heins, Rona Johnston, and Anita Willman), to compensate them for their commitment and time on behalf of the Classes in this litigation. These plaintiffs have been supportive and involved in this litigation for more than eight years, including responding to discovery requests seeking detailed information regarding their dietary habits and food purchasing habits, and labels from empty food containers in their homes. Any service awards will be paid by Conagra separate from and in addition to the other settlement benefits provided to the Class Members. S.A., §8.1.4.

F. Release

In exchange for the benefits provided under the Settlement, Class Members will release Conagra and related entities from all claims that have been or could have been brought in connection with Conagra's distribution, labeling, packaging, marketing, advertising, and/or sale of the Wesson Oil Products during the applicable Class Periods subject only to the express exceptions listed in the Reservation of Claims and Rights in Section 7.2. Specifically excluded from this release is any claim for bodily injury allegedly suffered in connection with the Wesson Oil Products. S.A., §7.1.

IV. THE COURT SHOULD DIRECT NOTICE TO THE CLASS MEMBERS UNDER RULE 23(E)(1)[5]

Rule 23(e) requires court approval of the compromise of claims brought on a class basis, and further requires that notice of the settlement be provided to the class. Under the recently-amended Rule 23(e)(1)

> The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.

Fed. R. Civ. P. 23(e)(1)(B).[6]

Rule 23(e)(2), in turn, provides:

> ***Approval of the Proposal.*** If the proposal would bind class

[5] The decision of a court to give notice under Rule 23(e)(1) was previously referred to as "preliminary approval." *See* 2018 Advisory Committee Note., Subdivision (c)(2).

[6] Section e(1)(B)(ii), concerning potential certification of the class for purposes of judgment on the proposal, is applicable where, as here, classes have previously been certified. *See* 2018 Advisory Committee Notes.

> members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> **(A)** the class representatives and class counsel have adequately represented the class;
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> **(B)** the proposal was negotiated at arm's length;
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> **(C)** 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); and
>
> **(D)** the proposal treats class members equitably relative to each other.

The factors to be considered by the Court in deciding whether to grant approval of a settlement under Rule 23(e)(2) are largely reflected in the factors already used in this Circuit for final approval. Separate analysis of the Rule 23(e)(2) factors is also provided below.

As a matter of public policy, settlement is a strongly favored method for resolving disputes, especially in complex class actions. *See In re Syncor ERISA Litig*., 516 F.3d 1095, 1101 (9th Cir. 2008) ("[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *Churchill Vill., L.L.C. v. Gen. Elec*., 361 F.3d 566, 576 (9th Cir. 2004). The "decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants and their strategies, positions, and proof." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

A. The Court will likely be able to approve the Settlement under Rule 23(e)(2) (as required by Rule 23(e)(1)(B)(i))

The factors used in this Circuit to review proposed class action settlements are: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement;

(5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a government participant; (8) the reaction of the class members to the proposed settlement; and (9) whether the settlement is a product of collusion among the parties. *In re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill Vill*., 361 F.3d at 575).

Each of the factors (save only the "reaction of the class," which is not yet known) shows the court will likely be able to approve the settlement under Rule 23(e)(2).

1. The Strength of Plaintiffs' Case

Plaintiffs believe the merits of their case are strong. Despite Conagra's denials, Plaintiffs assert there is abundant evidence that the "100% Natural" claim, which appeared on every bottle of Wesson Oil sold during the class period, was material to consumers, that consumers interpreted the claim to mean that the products did not contain GMOs, and that every Class member paid a premium price for Wesson Oils due to the presence of the "100% Natural" claim on the label.

Plaintiffs' evidence is found in two general categories of documents: (i) objective third-party surveys that, as Judge Morrow found, "tend to show that...consumers find the '100% Natural' claim material to their purchasing decisions consumer purchasing decisions;" and, in addition, support Plaintiffs' contention that a "natural" claim is understood by consumers to mean that the product does not contain GMOs; and (ii) internal Conagra documents obtained by Plaintiffs in discovery demonstrating that consumers exposed to a "100% Natural" or "Natural" claim on Conagra product labels generally consider the representation a significant factor in their purchasing decisions.[7]

Conagra contests the validity and relevance of the third-party surveys as well as Plaintiffs' interpretation of the internal Conagra documents. Opposing class certification, Conagra submitted the results of a consumer survey commissioned by Conagra showing that the "100% Natural" claim on Wesson Oils was not material to consumers, and that the label claim had no impact on whether consumers believed the product to be GMO-free.[8]

[7] *See In re Conagra Foods, Inc.*, 90 F. Supp. 3d 919, 1018 (C.D. Cal. 2015) ("*Conagra II*")

[8] ECF No. 383 at 18-19.

Plaintiffs' primary objective in this litigation was achieved when Conagra decided to remove the "100% Natural" claim from Wesson labels, and stopped its decades-long practice of marketing Wesson Oils as "natural." 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 Oil. 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 have not had an opportunity to conduct discovery regarding Conagra's decision to implement the label and marketing change, or to seek a ruling that this litigation was a "catalyst" in that decision. Nonetheless, the injunctive relief agreed to as part of this settlement assures that, should Conagra reacquire the Wesson Oil brand which it divested in February 2019, Conagra will not label or market Wesson Oils as "natural" unless legislation or regulation authorizing use of a 'natural' claim on a product containing processed oil from genetically engineered seed stock is implemented.

Regardless of the parties' evaluations of the strength of Plaintiffs' case, this Settlement includes monetary relief for Class Members *substantially greater than they could have obtained at trial*, as explained below (Monetary Compensation to Class Members).

2. The Risk, Expense, Complexity, and Duration of Further Litigation

While Plaintiffs believe their case is a strong one, the complexity and risk of further litigation are substantial. The risks of continuing this litigation include (1) the possible success of Conagra's vigorous defense to plaintiffs' assertions that the challenged claims are misleading and continued denial of all allegations of wrongdoing; (2) the chance of Conagra moving to decertify the certified litigation classes; (3) the need for both Parties to engage in further discovery; (4) further motion practice, including *Daubert* motions, motions for summary judgment, and motions *in limine*; (5) Conagra's likely aggressive challenges to Plaintiffs' price premium damages methodology; and (6) a possible adverse outcome at trial.

Fact discovery would need to be reopened for Plaintiffs to obtain relevant discovery regarding Conagra's label and marketing change in 2017, for Conagra to update past document productions, and

for the parties to resolve issues surrounding Conagra's productions of documents just preceding the close of fact discovery in 2015. At the close of reopened fact discovery, expert reports, rebuttal reports, and replies would be exchanged, and expert discovery would ensue, with renewed *Daubert* motions and/or evidentiary objections by both sides a virtual certainty. Preparation for trial would be arduous and expensive.

In a Scheduling Order issued on October 24, 2018, before the parties reached this Settlement, the Court allowed approximately six months for discovery and set a trial date of November 5, 2019. This Settlement provides Class Members with monetary compensation *in excess of what they could obtain at trial*, and injunctive relief to ensure the continuation of Conagra's label and marketing changes. In addition, it offers certainty and prompt relief, neither of which accompany continued litigation. In contrast, further litigation – likely extending several years including anticipated appeals – would squander the resources of the parties and the Court with no possible benefit to the Classes.

The substantial relief obtained through this Settlement, balanced against the length, expense, and uncertainty of further litigation, weighs in favor of approval. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("The Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.") (citation omitted).

3. The Risk of Maintaining Class Action Status Through Trial

While the Court has previously certified eleven separate state law classes, and the Ninth Circuit Court of Appeals affirmed that decision, and the United States Supreme Court declined to review the Ninth Circuit's affirmance, Plaintiffs anticipate that Conagra may seek to decertify the Classes based on changes in both the factual and legal landscapes.

4. The Amount Offered in Settlement

a. The Value of Injunctive Relief

In 2017, approximately six years into this litigation, Conagra removed the "100% Natural" claim from all Wesson labels, and stopped advertising and marketing Wesson Oils as "natural;" the

changes were completed by July 2017. The injunctive relief agreed to in this Settlement guarantees that, should Conagra reacquire the Wesson Oil brand it divested on February 25, 2019, it will not revert to labeling, advertising or marketing Wesson Oils as "natural" unless the FDA issues guidance or a regulation, or federal legislation is enacted, permitting use of a "natural" claim on a product containing processed oil derived from genetically engineered seed stock. Thus, Plaintiffs contend Wesson purchasers have benefitted from the removal of the "100% Natural" claim since July 2017.

Plaintiffs' damages expert Colin Weir has calculated that Wesson purchasers in the eleven class states paid approximately $11,540,000 more *per year* for the products due to the presence of the "100% Natural" claim on the labels. *See* Weir Decl. ¶ 24. Thus, according to the calculations of Plaintiffs' expert, the value of the labeling change from July 1, 2017 to February 25, 2019, when Conagra sold the Wesson brand, is approximately $19,080,000.[9] Conagra denies this litigation in any way contributed to the decision to drop the 'natural' claim from Wesson Oil in 2017 and does not agree with Weir's calculation of the purported value of this label change, in part because the calculation fails to account for only that portion of the 'natural' claim attributable to a belief the product is GMO-free.

There is no reason to believe that legislation or regulation permitting the use of a "natural" claim on Wesson Oils is imminent.[10] Should Conagra reacquire the Wesson Oil brand, Plaintiffs contend the benefits of the label change would continue for at least two more years, raising the total value of the labeling and marketing changes to more than $42,000,000.

More importantly, in the absence of such a reacquisition, Plaintiffs contend it is highly unlikely that Richardson International will resume labeling Wesson products as "natural" without

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[9] It should also be noted that the "100% Natural" label has benefitted Wesson Oil purchasers throughout the United States, not just in the eleven Class States (which represent approximately 44% of the national population.)

[10] In another case involving a claim that a product containing GMOs was deceptively marketed as "natural," a court recently lifted a stay previously granted on the ground of "primary jurisdiction," observing that, while the FDA has stated that it "plans to publicly communicate next steps regarding Agency policies related to 'natural.'" in 2019, "this hardly suggests that rulemaking is imminent." The court further noted that "such agency action typically takes between two and five years to complete." *In re Kind LLC "Healthy & All Natural" Litig.*, No. 1:16-cv-00959-WHP, 2019 U.S. Dist LEXIS 21892 (S.D.N.Y. Feb. 11, 2019).

affirmative legislative or regulatory authorization in the U.S. First, Richardson agreed to purchase the Wesson brand after Conagra removed the allegedly misleading "natural" claim from the labels. Second, it may be assumed that Richardson is aware of this litigation as well as myriad other litigations concerning "natural" labeling and, thus, cognizant of the likelihood that it would be embroiled in U.S. litigation should it revert to labeling Wesson Oils as "natural." Finally, the issuance of the requested injunction by this Court, combined with the award of monetary compensation to Class Members, will serve to further apprise Richardson of the potential liability it may face should it revert to labeling Wesson Oils as "natural." [11]

According to the Weir estimate, if just one additional year passes without "natural" claims being restored to Wesson Oils labels, the benefits to class members will reach $30,620,520.[12]

b. Monetary Compensation to Class Members

The Settlement provides that Class Members can obtain compensation of $0.15 for each unit of Wesson Oils they purchased during the relevant Class Period, up to a maximum of 30 units per Household with no proofs of purchase required. There is no limit on the number of units for which Class Members can be compensated if they submit documentary proofs of purchase.

While $0.15 per unit is a modest amount when considered in isolation, it is more than the best-case result at trial, which would have yielded maximum damages of approximately $0.102 (10.2 cents) per unit. See Weir Decl. ¶ 35. This figure takes into account Judge Morrow's ruling that the appropriate measure of damages in the case was not the price premium paid by Class Members due to the presence of the "100% Natural" claim, as Plaintiffs' claimed, but only the portion of that premium attributable to consumers' belief that "100% Natural" meant that the products were GMO-free. To satisfy this requirement, Mr. Weir's firm supervised the conduct of a conjoint survey, the results of which indicated that approximately 27% of the "value of the "natural" claim on Wesson

[11]. In the unlikely circumstance that Richardson does consider rebranding the products as "natural," the process of market research, label redesign, production change, and physical rollout would take several months, at minimum.

12 This calculation diverges from the Parties' mediated agreement that the value of the forward-looking injunctive relief was $27,000,000. Conagra does not agree with or support Weir's calculations.

Oils was due to its "non-GMO" meaning. Weir Dec. ¶ 34. Judge Morrow's ruling on damages thus reduced the maximum per-unit compensation Class Members could seek at trial by 73%, to approximately $0.102 per unit.[13] Thus, the $0.15 per-unit compensation available to Class Members in the Settlement is approximately *36% higher* than the maximum they could have obtained at trial.

In addition to the per-unit compensation available to all Class Members, the Settlement includes a $575,000 fund to be allocated solely among New York and Oregon Class Members who submit valid claim forms, in proportion to the number of units they purchased at retail during the relevant time period. This fund is intended to compensate New York and Oregon Class Members for the statutory damages provided for in the consumer protections laws of those states and sought by Plaintiffs. Under N.Y. Gen. Bus. Law § 349(h), individuals may recover actual damages or statutory damages of $50 per purchase for "unlawful actions or practices in the conduct of business, trade, or commerce."[14] Under Or. Rev. Stat. § 646.638(8), plaintiffs who sustained a loss as a result of a "reckless or knowing practice" declared unlawful by Or. Rev. Stat. § 646.608 "may recover actual damages, or statutory damages of $200, whichever is greater, along with punitive damages and equitable relief."[15] Plaintiffs contend, and Conagra contests, that the "reckless or knowing" standard would be met in this case.

After extended arm's-length negotiations mediated by Magistrate Judge McCormick, taking into account the estimated class sizes in New York and Oregon; anticipated claims rates; the time, expense, and risks of proceeding to trial; and the difficulty of prevailing under the "reckless or

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[13] Plaintiffs contend that Judge Morrow's ruling on this point was incorrect and would seek to have it reversed on appeal after any trial. Conagra disputes Mr. Weir's analysis, and specifically disputes the existence of any price premium for "natural" claims.

[14] Plaintiffs contend case law establishes that N.Y statutory damages are available in class actions in federal court. *In re Scott EZ Seed Litig.*, No. 12 CV 4272, 2017 WL 3396433, *11 (S.D. N.Y. Aug. 8, 2017), motion to certify appeal granted, No. 12 CV 4727 (VB), 2017 WL 6398627 (S.D.N.Y. Aug. 31, 2017), and reconsideration denied, 2018 WL 1274965 (S.D.N.Y. Mar. 5, 2018) (holding that statutory damages in a class action can be calculated simply by multiplying $50 times the number of deceptive units purchased by the class); *see also Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 501 (E.D.N.Y. Mar. 27, 2017).

[15] The Oregon Court of Appeals recently affirmed a $409,300,000 statutory damages award to 2,046,500 class members under § 646.638(8). *Scharfstein v. BP W. Coast Prods., LLC*, 292 Or. App. 69 (2018).

knowing" standard in the Oregon statute, the parties agreed that a fund of $575,000 is fair, reasonable, and adequate to further compensate New York and Oregon Class Members for the statutory damages to which Plaintiffs contend they may be entitled if they were to prevail at trial.

5. The Extent of Discovery Completed and the Stage of Proceedings

Despite the Parties' long-running and, in some respects, unresolved, disputes over discovery in this case, the discovery obtained was sufficient for counsel on both sides to make well-informed judgments about the merits of the case and the risks of proceeding to trial. This factor favors approval. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (where the parties have "sufficient information to make an informed decision about settlement, this factor will weigh in favor of approval.").

6. The Experience and View of Counsel

Counsel for both sides have extensive experience in class action litigation and are thoroughly familiar with the factual and legal issues involved. "Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *See Gribble v. Cool Trans Inc.*, No. CV 06-04863 GAF SHX, 2008 WL 5281665, at *9 (C.D. Cal. Dec. 15, 2008) quoting *Nat'l Rural Telecomms Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

Class Counsel have evaluated the inherent risks and expenses associated with continuing this litigation and believe that the provision of the injunctive and monetary relief outlined above adequately compensates Class Members for the harm they allegedly suffered.

7. The Presence of a Government Participant

Plaintiffs here pursued their claims independently. Should preliminary approval be granted, the United States Attorney General and Attorneys General of each of the states will be notified pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, and given an opportunity to raise any objections or concerns they may have.

8. The Reaction of the Class Members to the Proposed Settlement

Because notice has not yet been given, this factor is not yet implicated. However, Class Representatives all support the Settlement. Kelston/Levitt ¶ 57.

9. Lack of Collusion Among the Parties

"Before approving a class action settlement, the district court must reach a reasoned judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion among, the negotiating parties." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir. 1992) (citations omitted). *See also* Fed. R. Civ. P. 23(e)(2)(B). Where a settlement is the product of arm's-length negotiations conducted by capable and experienced counsel, the court begins its analysis with a presumption that the settlement is fair and reasonable. *See* 4 William B. Rubenstein, Alba Conte & Herbert Newberg, Newberg on Class Actions § 13.45 (5th ed. 2014); *See G. F. v. Contra Costa Cty*., 2015 WL 4606078, at *13 (N.D. Cal. July 30, 2015) ("[T]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive).

The Settlement here is the product of extensive arm's-length and adversarial settlement discussions. There were two separate mediations: the first, before the Honorable Edward A. Infante (Ret.), Former Chief Magistrate Judge, U.S. District Court, Northern District of California, in person on January 29, 2018, and thereafter by telephone through March 19, 2018, failed to reach a settlement. The Settlement Agreement was reached only after further arm's length negotiations, and only with the very able and active participation of Magistrate Judge Douglas M. McCormick as mediator. in person, by telephone, and by email from June 8, 2018 through the filing of this Motion.

There is no evidence or indication of collusion between the parties. The Parties did not commence discussion of attorneys' fees until agreement on all substantive portions of the class resolution had been reached. Agreement on the payment of attorneys' fees was resolved only by both parties accepting a "mediator's proposal" offered by Magistrate Judge McCormick. This factor favors the granting of this Motion.

B. The Rule 23(e)(2) considerations favor approval

Under the recently-amended Rule 23(e)(2), a court considering whether to grant approval of a class settlement must also consider 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; and (D) the proposal treats class members equitably relative to

each other. These factors overlap substantially with the *Churchill* factors discussed above, and likewise support the granting of this Motion.

1. The Class Representatives and Class Counsel have adequately represented the Class

The attorneys of DiCello Levitt Gutzler and MTPG, now seeking formal appointment as Class Counsel, were appointed Interim Class Counsel on November 1, 2011 (ECF No. 48), have continued acting as class counsel throughout the litigation, and have provided excellent representation to the Classes for over seven years.[16] As recounted in the Kelston/Levitt Declaration at ¶22, Counsel has:

- litigated numerous motions to dismiss and motions to stay;
- conducted extensive, fiercely-contested discovery;
- retained various experts to support class certification and this Motion;
- litigated two rounds of class certification motions, ultimately obtaining certification of eleven separate state classes;
- successfully opposed Conagra's appeal of class certification to the Ninth Circuit (thereby obtaining a groundbreaking decision on the hotly contested issue of "ascertainability" in class actions);
- opposed Conagra's writ of certiorari to the United States Supreme Court for review of the Ninth Circuit decision; and
- engaged in two separate mediations to obtain this Settlement, which provides monetary compensation to Class Members in excess of what they could obtain at trial as well as injunctive relief valued at $27,000,000.

The Class Representatives' interests are aligned with and are not antagonistic to the other Class Members' interests. Moreover, the Class Representatives each committed substantial time to this case, and each reviewed and approved of the proposed Settlement upon finding it was fair,

[16] In their Amended Motion for Class Certification, Plaintiffs requested that the Court "designate Plaintiffs as class representatives of the separate statewide classes they respectively seek to represent, appoint Plaintiffs' Interim Co-Lead Counsel as Class Counsel." Judge Morrow explicitly ruled that "named plaintiffs and class counsel satisfy Rule 23(a)'s adequacy requirement" (ECF No. 545 at 57), but did not expressly appoint class representatives or class counsel. Ariana J. Tadler and Adam J. Levitt, who have led this litigation from the outset and who were appointed Interim Co-Lead Counsel when they were each partners at other law firms, have continued as lead counsels throughout the case and are now partners at MTPG and DiCello Levitt Gutzler, respectively.

reasonable, and adequate for the Classes. The Class Representatives have fairly and adequately protected the interests of the Classes. This consideration thus supports approval of the Settlement.

2. The Settlement was negotiated at arm's length

As detailed in the Lack of Collusion section above, this factor favors the granting of this Motion.

3. The relief provided for the Classes, including the mediated agreement for attorneys' fees, is adequate.

Rule 23(e)(2)(C) directs the Court to 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).

See Section IV(A)(2), above, for the costs, risks, and delay of trial and appeal. *See* Section III(C), above, for discussion of the effectiveness of the proposed notice and claims process. Apart from the Settlement Agreement submitted herewith, there are no agreements requiring disclosure under Rule 23(e)(3).

The mediated agreement that Conagra will pay attorneys' fees and costs awarded by the Court in a total amount not to exceed $6,850,000.is fair and reasonable. As the record before this Court demonstrates, the settlement in this case is the result of Plaintiffs' Counsel's long and diligent efforts in the face of stiff opposition by Conagra and the law firms that represented Conagra throughout this litigation. Conagra's agreement not to contest a request for an award of fees and expenses up to the maximum amount was agreed to by the Parties after extensive negotiation and with the assistance of Magistrate Judge McCormick as mediator after the Parties had reached agreement on all substantive terms pertaining to class-wide relief.

In a class action settlement, a court may award reasonable attorneys' fees as authorized by law or by the parties' agreement. See Fed. R. Civ. P. 23(h); *see also Hendricks v. Starkist Co*., No. 13-

00729, 2016 WL 5462423, at *10 (N.D. Cal. Sept. 29, 2016), *aff'd*, 2018 WL 5115482 (9th Cir. Oct. 19, 2018) (stating a court has the power to award reasonable attorneys' fees and costs where "a litigant proceeding in a representative capacity secures a 'substantial benefit' for a class of persons"). The two primary methods in this District for determining a reasonable fee are the "lodestar" and "percentage-of-the-fund" methods. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Where, as here, a significant component of the relief provided is injunctive relief, the appropriate method to use is the lodestar method. *See Hanlon.*, 150 F.3d at, 1029; *see also In re Toys "R" Us FACTA Litig.*, 295 F.R.D. 438, 460 (C.D. Cal. 2014).

The mediated maximum amount for attorneys' fees and unreimbursed costs in this case represents *approximately 50%* of Plaintiffs' counsel's actual total combined lodestar and unreimbursed expenses.[17] The Ninth Circuit has stated that "[t]here is a strong presumption that the lodestar figure represents a reasonable fee." *Rodriguez v. W. Publ'g Corp.*, 602 F. App'x 385, 387 (9th Cir. 2015). Given the demands of this case, which included bitterly contested discovery extending over two years, multiple motions to dismiss and stay, two rounds of extensively litigated class certification motions, a Rule 23(f) petition and appeal to the Ninth Circuit, and a certiorari petition to the United States Supreme Court, a request for counsel's *full* lodestar would be justified. Not only has Plaintiffs' counsel achieved certification of eleven state classes, affirmed by the Ninth Circuit, but the Settlement, at the time it was reached, also fully realized the two main objectives of the litigation: injunctive relief (valued at $27 million) and monetary compensation for Class Members in excess of the amount they could achieve at trial. Counsel assumed significant risk of non-payment in prosecuting this case. The legal issues were novel and challenging; while cases challenging the use of "natural" labels on GMO products have become commonplace, this is believed to be the first such case ever filed. Moreover, the decision obtained by Plaintiffs from the Ninth Circuit, affirming Judge Morrow's grant of class certification, has expanded the ability of plaintiffs to maintain class actions

[17] Including the lodestar and unreimbursed expenses of other counsel who performed work for the benefit of Class Members would reduce further percentage of total lodestar and expenses being requested here.

concerning low-priced goods. Indeed, the Ninth Circuit opinion has already been cited in over 90 court decisions across the United States.

Plaintiffs' counsel prosecuted this matter on a purely contingent basis, agreeing to advance all necessary expenses and that they would only receive a fee if there was a recovery. Plaintiffs' counsel's investment of time and resources in this case has been very significant. Plaintiffs' counsel's "substantial outlay, when there is a risk that none of it will be recovered, further supports the award of the requested fees" here. *In re Omnivision Techs*., 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008).

In sum, the relief provided to the Classes, including maximum award of attorney's fees and costs representing less than half of counsel's actual expenditures, strongly supports granting this Motion.

4. The proposal treats Class Members equitably.

The proposed 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. As explained above at 16, New York and Oregon Class Members are eligible to receive additional compensation due to the statutory damage provisions in their state consumer protection statutes that Plaintiffs contend they may recover, in amounts agreed after extensive arm's length negotiations and with the assistance of Magistrate Judge McCormick as mediator.

Moreover, plaintiff service awards, such as those requested for the Class Representatives, are commonly awarded in class actions, are well-justified under the circumstances here, and are appropriate in amount given precedent and the Class Representatives' commitment and effort throughout the course of this litigation.

V. THE COURT WILL LIKELY BE ABLE TO CERTIFY THE CLASSES FOR PURPOSES OF JUDGMENT (RULE 23(e)(1)(B)(II)).

The Court previously certified eleven statewide litigation classes pursuant to Rule 23(b)(3). *See* ECF No. 545. The only changes in the class definitions proposed for purposes of judgment reflect

that the "100% Natural" claim was removed from Wesson Oils labels as of July 1, 2017 and, therefore, the class periods end at that time.

VI. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN TO DIRECT NOTICE IN A REASONABLE MANNER TO ALL CLASS MEMBERS

Rule 23 requires that prior to final approval, the "court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). For classes certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

Here, because there are no lists with contact information for Class Members and none could be created through reasonable effort, the best practicable class notice in this situation will take the form of publication through a print and digital media campaign. Publication Notice would begin within ten days after entry of the Proposed Order and will continue, consistent with the Notice Plan, for twelve weeks (84 days). This will provide sufficient time for Class Members to decide whether to participate in the Settlement, object, or opt out. Keough Decl., ¶ 28. The proposed notice program also provides sufficiently detailed notice. *See Churchill Vill.*, 361 F.3d at 575 ("Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard'") (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)). Copies of all the notice documents are attached to the Settlement Agreement; they are clear and concise, and directly apprise Class Members of all the information they need to know to exercise their rights as Class Members. Fed. R. Civ. P. 23(c)(2)(B). The Publication Notice defines the Classes and informs Class Members about: the proposed settlement; their right to opt out or object; the need to file a Claim Form to receive monetary benefits; a summary of settlement benefits; the prospective request for attorneys' fees and expenses and service awards; and the fact that they will be bound by the judgment if they do not opt out, even if they do not submit a Claim Form. The Publication Notice refers Class Members to the Settlement Website where they can obtain the long-form Posted Notice, which provides more details about the Action

and the Settlement, procedures for opting out or objecting, and methods about obtaining additional information, in English and Spanish. The Settlement Website will also contain relevant pleadings, a full copy of the Settlement Agreement, and the fee and expense application when it is filed.

Class Members who wish to seek monetary benefits under the Settlement will need to fill out and submit a simple Claim Form online. Alternatively, they have the option to print copies and mail the Claim Form to the Settlement Administrator. The Claim Form requires them to certify under the penalty of perjury their name and address, and basic information about the product purchases. The Claim Form can be completed in a few minutes.

The Notice Plan provides all the information necessary for Class Members to make informed decisions with respect to whether they remain in or opt out of the Settlement, or object to the proposed Settlement. The Notice Plan has been developed by a provider with significant experience in designing notice plans in large and national class actions similar to this one. Accordingly, the content and method of dissemination of the proposed Notice fully comports with the requirements of due process and applicable case law.

VII. THE COURT SHOULD APPOINT JND LEGAL ADMINISTRATION TO SERVE AS THE SETTLEMENT ADMINISTRATOR

In connection with implementing the Notice Plan and administering the settlement benefits, Plaintiffs move the Court to appoint JND Legal Administration to serve as the Settlement Administrator. JND was selected by Magistrate Judge McCormick based on competing submissions by the Parties in conjunction with the Settlement mediation process. JND has vast experience in many complex class action lawsuits. Keogh Decl., ¶¶ [1-11].

VIII. THE COURT SHOULD APPOINT CLASS COUNSEL UNDER RULE 23(G)

Under Rule 23, "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, courts generally consider the following: (1) the proposed class counsel's work in identifying or investigating potential claims, (2) the proposed class counsel's experience in handling class actions or other complex litigation, and the types of claims asserted in the case, (3) the proposed

class counsel's knowledge of the applicable law, and (4) the proposed class counsel's resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

The Court should appoint DiCello Levitt Gutzler LLC and Milberg Tadler Phillips Grossman LLP as Class Counsel. Both firms have extensive experience in class actions, and in consumer class actions. Kelston/Levitt Ex. 2,3.

IX. THE COURT SHOULD SCHEDULE DATES FOR THE FINAL APPROVAL PROCESS

The next steps in the settlement approval process are to notify Class Members of the proposed Settlement, allow Class Members an opportunity to file objections, and hold a Final Approval Hearing. Towards those ends, the Parties respectfully propose the following schedule:

ACTION	TIMING
CAFA Notice Deadline	10 days after the Motion for Order Directing Notice Is Filed
Hearing on Motion Directing Notice	April 15, 2019
First Publication of Class Notice	10 days after issuance of the Order Directing Notice
Settlement Website Established	One day before First Publication of Class Notice
Opt-Out Deadline	114 days after First Publication of Class Notice
Claims Deadline	130 days after First Publication of Class Notice
Motion for Final Approval and Fee and Expense Application Deadline	2 weeks before Objection Filing Deadline
Supplemental Filing in Support of Final Approval Deadline	33 days after Claims Deadline
Objection Filing Deadline	114 days after First Publication of Class Notice
Request to Appear at Hearing Filing Deadline	114 days after First Publication of Class Notice
Objection Response Deadline	2 weeks after Objection Filing Deadline
Final Approval Hearing	To be set by the Court, on or after 165 days after First Publication of Class Notice
Gross Settlement Proceeds Paid into Escrow Account	20 days after Final Effective Date

X. CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Court grant this Motion and enter the Proposed Order.

Respectfully submitted,

Dated: March 12, 2019

s/ David E. Azar

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Class Counsel

CERTIFICATE OF SERVICE

The undersigned certifies that, on March 12, 2019, 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: March 12, 2019

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