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11 ***Counsel for Plaintiff***

12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**

14 CURTIS HANSON, on behalf of himself, all
 15 others similarly situated, and the general public,

16 Plaintiff,

17 v.

18 WELCH FOODS INC.,

19 Defendant.

Case No. 3:20-cv-02011-JCS

20 **DECLARATION OF JACK FITZGERALD IN**
 21 **SUPPORT OF MOTION FOR PRELIMINARY**
 22 **APPROVAL OF CLASS SETTLEMENT**

23 Date: November 12, 2021, 9:30 a.m.

24 Judge: Hon. Joseph C. Spero

25 Location: Courtroom F – 15th Floor

1 I, Jack Fitzgerald, declare:

2 1. I am a member in good standing of the State Bars of California and New York; and of the
3 United States District Courts for the Northern, Central and Southern Districts of California, the Southern
4 and Eastern Districts of New York, and the Western District of Wisconsin; and of the United States Courts
5 of Appeal for the Second, Eighth, and Ninth Circuits. I make this declaration based on my own personal
6 knowledge, in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.

7 **The Settlement Agreement**

8 2. Attached hereto as Exhibit 1 is the parties' Settlement Agreement. There are no other
9 agreements made in connection with the proposed settlement or Settlement Agreement. *See* Fed. R. Civ. P.
10 23(e)(3).

11 **Plaintiff's (Unfiled) Motion to Strike**

12 3. Welch filed its Answer to Plaintiff's First Amended Complaint on July 7, 2020 (Dkt. No.
13 24). It asserted 29 "affirmative" defenses, many of which we believed were improper or inadequately
14 pleaded but would cause unnecessary discovery if allowed to stand. Accordingly, we drafted a motion to
15 strike. But to avoid burdening the Court if unnecessary, before filing, we provided the draft to Welch and
16 requested that that it "review the draft motion and consider voluntarily amending Welch's Answer to remove
17 any negative defenses . . . and any defense for which Welch currently lacks a legal or factual basis for
18 asserting." Welch subsequently filed an Amended Complaint with just 16 defenses (Dkt. No. 25). Although
19 the draft motion addressed, and we would have preferred Welch remove, more of Welch's affirmative
20 defenses, we elected not to file the motion in light of Welch's amendment.

21 **Discovery**

22 4. Discovery in this case was not extensive but was, in my opinion, sufficient for the parties to
23 understand the case and fairly evaluate its value and risks. This is especially true because, for the last five
24 years, our firm has been involved in prosecuting four other class actions based on similar liability theories:

- 25 • In *Hadley v. Kellogg Sales Co.*, No. 16-cv-4955-LHK (N.D. Cal.), we obtained
26 certification of a California class;¹ survived Kellogg's summary judgment motion and won our
27

28 ¹ *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084 (N.D. Cal. 2018).

1 motion for partial summary judgment against Kellogg;² and ultimately settled the action for a \$13
2 million non-reversionary common fund, and labeling changes.³

3 • In *Krommenhock v. Post Foods, LLC*, No. 16-cv-4958-WHO (N.D. Cal.), we
4 obtained certification of a California class and survived Post’s summary judgment motion;⁴ then
5 settled the action for a \$15 million non-reversionary common fund, and labeling changes.⁵

6 • In *Milan v. Clif Bar & Co.*, No. 18-cv-2354-JD (N.D. Cal.), we survived Clif’s motion
7 for summary judgment,⁶ and obtained certification of four California and New York classes.⁷

8 • In *McMorrow v. Mondelez Int’l, Inc.*, No. 17-cv-2327-BAS (S.D. Cal.), we obtained
9 certification of California and New York classes,⁸ then recently settled the action for a non-
10 reversionary common fund and labeling changes (the terms are not yet public).

11 5. Here, Plaintiff served document requests, interrogatories, and requests for admission in July
12 2020. Welch provided initial responses in September 2020 and, after the parties were able to informally
13 resolve several discovery disputes, Welch served supplemental responses in October 2020.

14 6. After significant meeting-and-conferring, including agreeing on search terms and custodians,
15 in February 2021, Welch began producing responsive documents. Ultimately, Plaintiff obtained from
16 Welch: (i) product labels and spreadsheets identifying each label’s approximate start and end dates, the
17 claims on each label, and any changes thereto;⁹ (ii) a spreadsheet identifying all scientific studies Welch
18 claimed substantiates its “healthy heart” claims, including Welch’s involvement in each study, if any; (iii)

19
20 ² *Hadley v. Kellogg Sales Co.*, 2019 WL 3804661 (N.D. Cal. Aug. 13, 2019), *reconsideration denied*, 2020
WL 3246335 (N.D. Cal. May 28, 2020).

21 ³ *Hadley v. Kellogg Sales Co.*, 2021 WL 3700746 (N.D. Cal. June 15, 2021) (Order Granting Motion for
22 Preliminary Approval).

23 ⁴ *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552 (N.D. Cal. 2020).

24 ⁵ *Krommenhock v. Post Foods, LLC*, 2021 WL 2910205 (N.D. Cal. 2021) (Order Granting Final Approval).

25 ⁶ *Milan* Dkt. No. 149 (“Defendant’s summary judgment motion . . . is denied for the reasons stated on the
record.”).

26 ⁷ *Milan v. Clif Bar & Co.*, 2021 WL 4427427 (N.D. Cal. Sept. 27, 2021).

27 ⁸ *McMorrow v. Mondelez Int’l, Inc.*, 2021 WL 859137 (S.D. Cal. Mar. 8, 2021).

28 ⁹ Based on my review, all Class Products included in the Settlement Agreement bore “healthy heart” claims.

1 communications from consumers and other attorneys concerning the labeling of the Class Products; (iv)
2 price lists; and (v) information about potential insurance coverage.

3 7. In July 2020, Plaintiff also subpoenaed, and in August 2020 received, documents from
4 Information Resources, Inc. (IRI), a company that collects and aggregates “scan” data for various consumer
5 products, showing nationwide sales of the Class Products. Because Welch did not provide Plaintiff with
6 sales data, we needed to subpoena IRI to obtain sales data, but would have subpoenaed IRI even if Welch
7 had provided figures, on a “trust but verify” basis, and because sometimes manufacturer data is old,
8 incomplete, or in a less usable form (like wholesale sales, rather than retail).

9 **The Parties’ Settlement Negotiations**

10 8. For purposes of settlement negotiations, we retained economist Colin B. Weir to process the
11 IRI data and estimate damages, which he did based on a hedonic regression he had performed in *Hadley*,
12 which had found the price premium attributable to “heart healthy” claims on Kellogg cereals to be 4.59%.¹⁰
13 Mr. Weir calculated that, from March 2016 to August 2020, nationwide sales of the three Welch products
14 at issue totaled \$159,995,951. Applying the 4.59% *Hadley* hedonic premium, Mr. Weir estimated
15 nationwide damages to be \$7,343,814.

16 9. Plaintiff provided Mr. Weir’s declaration to Welch on September 22, 2020. When Welch did
17 not engage, in December 2020, Plaintiff sent Welch a formal written settlement demand. In April 2020,
18 Welch’s in-house counsel advised me Welch was retaining new counsel, which substituted in on May 6,
19 2021.

20 10. On June 8, 2021, Welch countered Plaintiff’s December 2020 demand. Over several weeks,
21 the parties negotiated monetary and injunctive relief, ultimately reaching an agreement on August 4, 2021
22 for all material terms, which are now embodied in the Settlement Agreement.

23 **Settlement Considerations**

24 11. The decision to settle this case was made balancing numerous considerations.

25 12. First, we considered the potential recovery at trial. Extrapolating sales of the products
26 through the end of the Class Period per the Settlement Agreement, *i.e.*, through October 1, 2020, shows

27 _____
28 ¹⁰ See *Hadley v. Kellogg Sales Co.*, 2019 WL 3804661, at *24 (N.D. Cal. Aug. 13, 2019) (“Mr. Weir offers a hedonic regression showing a 4.59% price premium for the ‘Heart Healthy’ statement.”).

1 estimated nationwide sales of \$201,899,652.

	IRI Sales Data 3/27/2016 to 8/9/2020	Days	\$ Sold Per Day	Add'l Days from to 10/1/21	Est. Add'l \$ Sold	Total Est. Sales to 10/1/21
100% Grape Juice	\$139,618,525	1596	\$87,480	418	\$36,566,757	\$176,185,282
100% Black Cherry	\$16,125,353	1596	\$10,104	418	\$4,223,307	\$20,348,660
100% Juice Red Sangria	\$4,252,073	1596	\$2,664	418	\$1,113,638	\$5,365,711
Totals	\$159,995,951	-	\$100,248	-	\$41,903,701	\$201,899,652

9 In *Hadley*, Plaintiffs derived two price premium figures for “heart healthy” claims—the 4.59% figure from
10 Mr. Weir’s hedonic regression, and a 2.6% premium from a conjoint analysis performed by survey expert
11 Steven P. Gaskin.¹¹ Using these figures shows trial damages on behalf of a hypothetical nationwide class to
12 be between approximately \$5.25 million and \$9.27 million (with damages at \$7.27 million if the premium
13 figures from *Hadley* are averaged). That means the Settlement’s \$1.5 million common fund represents
14 between 16.2% and 28.6% of potential nationwide damages.

Sales	High (4.59%)	Low (2.6%)	Average (3.6%)
\$201,899,652	\$9,267,194	\$5,249,391	\$7,268,387
Common Fund as % of Damages	16.2%	28.6%	20.6%

18
19 ¹¹ We performed both types of analyses because it was unclear whether the Honorable Lucy H. Koh would
20 accept the hedonic regression after having previously rejected them in other cases—and indeed, she initially
21 deferred ruling on the hedonic because she found the conjoint analysis adequate. *See Hadley*, 324 F. Supp.
22 3d at 1111 (

[B]ecause the Court concluded above that Gaskin’s conjoint analysis—which, like Weir’s
22 hedonic regression, corresponds with Plaintiff’s affirmative misrepresentation theory of
23 liability—satisfies *Comcast* and is admissible under *Daubert*, Plaintiff has already established
24 that one of his proposed damages models can validly support his affirmative representation
25 theory of liability on a class-wide basis. . . . Thus, the Court finds that it need not address
Kellogg’s *Comcast* and *Daubert* arguments against Weir’s proposed hedonic regression
damages model in this class certification order.)

26 Performing a hedonic regression in this case is likely not possible because doing so requires at least several
27 competing products and must include those that have and do not have the challenged claim. In *Hadley*, there
28 were numerous other cereals, besides Kellogg’s, which made “Heart Healthy” claims, so a hedonic
regression was viable. Here, I am not aware of any other juices that make “healthy heart” claims. So to
calculate damages in this case, we very likely would have had to commission a conjoint survey.

1 Given the current state of the law, however, it would be nearly impossible to recover damages on behalf of
 2 a nationwide class in a single forum or proceeding. Instead, my firm or others would likely have had to file
 3 at least several actions alleging claims on behalf of individual or multi-state classes. This would cost millions
 4 of dollars more and take many additional years of litigation. Even then it might be impossible to get relief
 5 for consumers in some states, for example where class actions are not permitted—a path that would make
 6 little sense given the potential recovery. Here, Plaintiff only sought to represent a California class. *See* Dkt.
 7 No. 23, First Am. Compl. ¶ 49. If that class was certified and its claims tried—and assuming sales are
 8 proportional to California’s 12% of the U.S. population—maximum damages would be approximately \$1.1
 9 million, with the Settlement’s common fund representing between 134.9% and 238.1% of the California’s
 10 class’s maximum trial damages.

CA Sales	High (4.59%)	Low (2.6%)	Average (3.6%)
\$24,227,958	\$1,112,063	\$629,927	\$872,206
Common Fund as % of Damages	134.9%	238.1%	172.0%

14 Given that the Settlement’s Common Fund is more than Plaintiff could have recovered at trial in this case,
 15 and a reasonable proportion of hypothetical nationwide damages, the settlement amount of \$1.5 million
 16 seems like a reasonable, if not excellent result. This is especially true because the hedonic regression Mr.
 17 Weir performed in *Hadley* cost more than \$120,000 for the hedonic alone, and more than \$250,000 when
 18 considering related work, including depositions and responsive declarations and reports. So establishing
 19 damages here could quickly and easily eat up much of the case’s value.

20 13. Second, we considered the proposed settlement amount in relation to the sales and potential
 21 damages at issue in other cases challenging health claims on sugary foods that have recently settled on
 22 nationwide class bases, namely *Krommenhock*, *Hadley*, and *McMorrow*.

Case	Settlement	Sales at Issue	Trial Damages ¹²	Settlement % of Sales	Settlement % of Damages
<i>Krommenhock</i>	\$15 M	\$5.6 B	\$482.5 M	0.27%	3.1%
<i>Hadley</i>	\$13 M	\$3.9 B	\$135 M	0.33%	9.6%
<i>McMorrow</i>	<i>not yet public</i>			0.44%	6.3%
Averages:				0.35%	6.3%
<i>Hanson</i>	\$1.5 M	\$201.9 M	\$7.3 M	0.74%	20.5%

28 ¹² Nationwide sales equivalents; averages used where ranges applied.

1 As shown in the table above, the settlement of this action is more than twice (211%) the average of the three
2 other high-sugar settlements when compared to the sales at issue, and more than three times (325%) the
3 average when compared to nationwide damages.¹³ Based on this, the \$1.5 million settlement amount seems
4 like a reasonable, if not excellent result.

5 14. Third, we considered that Welch had reasonable arguments and evidence for why
6 establishing liability would be difficult. This included governmental and other authoritative guidance Welch
7 cited that might seem to support the consumption of 100% fruit juice for good health. It also included
8 Welch's reliance on more than 30 studies it claimed support "healthy heart" claims for concord grape juice
9 by supposedly showing that the polyphenols in concord grape juice have heart-protective effects. Although
10 our firm is quite familiar with sugar science based on our work in *Hadley*, *Krommenhock*, *McMorrow* and
11 *Milan*, this is the first and only case we have brought involving a beverage. And because fruit juice is not
12 considered an added sugar, and thus not technically recommended to be limited by the FDA, this unique
13 subject matter may have presented particular challenges we have not previously encountered.

14 15. Fourth, we had to take into account the current legal climate surrounding Plaintiff's claims.
15 Although *Krommenhock*, *Hadley*, and *McMorrow* are fairly characterized as successful for their respective
16 plaintiffs, the underlying case theory has had mixed results, including some early fatal results. In December
17 2018, the Honorable William Alsup dismissed a similar case Plaintiffs' counsel brought against a product
18 called Perfect Bar, finding the theory not plausible under the reasonable consumer standard. *See Clark v.*
19 *Perfect Bar, LLC*, 2018 WL 7048788, at *1 (N.D. Cal. Dec. 21, 2018). Shortly thereafter, the Honorable
20 Jeffrey S. White dismissed a case brought against General Mills. *See Truxel v. General Mills Sales, LLC*,
21 2019 WL 3940956, at *4 (N.D. Cal. Aug. 13, 2019) ("Plaintiffs cannot plausibly claim to be misled about
22 the sugar content of their cereal purchases," and "it was up to the Plaintiffs, as reasonable consumers, to
23 come to their own conclusions about whether or not the sugar content was healthy for them."). The *Clark*
24 and *Truxel* plaintiffs both appealed. The *Clark* panel took the matter under submission without oral
25 argument. The *Truxel* panel then held argument in June 2020 during which I argued that plaintiffs'
26 successful demonstration of a genuine issue of material fact on summary judgment in *Krommenhock* and
27

28 ¹³ If including the Settlement here in the average, this becomes 166% the average compared to sales at issue
and 208% the average compared to nationwide damages.

1 *Hadley* meant that *Truxel* could *not* be dismissed as implausible under the reasonable consumer standard.¹⁴
 2 Nevertheless, the panel appeared skeptical.¹⁵ A month later, on August 11, 2020, the *Clark* panel affirmed
 3 Judge Alsup’s decision, though on the alternative basis of federal preemption, seemingly leaving the
 4 reasonable consumer issue to the *Truxel* panel to resolve. *See Clark v. Perfect Bar, LLC*, 816 Fed. App’x
 5 141 (9th Cir. 2020).¹⁶ Ultimately, the risk that a decision in *Truxel* could undermine the other pending cases
 6 was too great, and we made a difficult decision to voluntarily dismiss the *Truxel* appeal.¹⁷ This illustrates
 7 that the case theory has real risk in the Ninth Circuit right now.

8 16. When considering the amount and likelihood of recovering damages, the possible lengthy
 9 time to resolution because of a delayed trial and subsequent appeals, the low potential recovery compared
 10 to the costs of getting through class certification, trial, and appeals, and the other expenses and risks
 11 attendant to those steps, I and my colleagues—together with Plaintiff Curtis Hanson—determined that
 12 settling this action for a \$1.5 million non-reversionary common fund at this juncture was fair, reasonable,
 13 and appropriate. In fact, we believe it is an excellent result given all the above considerations and are proud
 14 of having achieved this result.

Selection of the Proposed Class Administrator

15
 16 17. My firm vetted and selected Postlethwaite & Netterville, APAC (“P&N”) as Class
 17 Administrator for this Settlement. We began by identifying and considering settlement administrators with

18
 19 ¹⁴ Archived video of the argument is available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000017597.

20 ¹⁵ Following the arguments, Law360 ran a story in which it noted “U.S. Circuit Court Judge Danielle J.
 21 Hunsacker . . . pressed the consumers’ counsel Jack Fitzgerald on whether the lawsuit against General Mills
 22 Sales Inc. takes aim at a dietary issue, as opposed to a product issue,” and that “at the end of [Fitzgerald’s]
 23 arguments, Judge Hunsaker still appeared unswayed that General Mills’ sugar-packed cereals can be singled
 out.” *See Exhibit 2*, Dorothy Atkins, “9th Circ. Judge Doubts General Mills False Label Claims,”
 Law360.com (June 12, 2020).

24 ¹⁶ The Ninth Circuit’s *Clark* decision is somewhat odd in that its holding is conditional, finding only that
 25 “[t]o the extent Appellants’ claims advance the notion that Perfect Bar made an improper health claim due
 26 to added sugar levels in the bar, those claims are not viable,” *id.* at 143 (emphasis added) (citing 21 C.F.R.
 27 § 101.14(a)(1) (regulating health claims)), but not that Appellants actually advanced such claims—which
 they did not. A defendant in a similar case recently moved for summary judgment under *Clark*. *See Exhibit*
 28 *3, Milan v. Clif Bar & Co.*, No. 18-cv-2354-JD (N.D. Cal.), Dkt. No. 106, Def. Mot. for Summ. J. at 10-12.
 Thus the *Clark* decision presented another risk for Plaintiff in this case.

¹⁷ A true and correct copy of the Court of Appeal’s dismissal order is attached hereto as Exhibit 4.

1 whom we had each previously worked or received bids from. Based on that, we asked three administrators
2 for bids, and received numerous iterations from each.

3 18. To fairly compare their bids, we broke them down broadly into notice and administration
4 costs. For notice costs, we compared (by inputting on a spreadsheet) the bids' estimated audience, reach,
5 and frequency, online and hard copy publication costs, online and additional impressions, total cost, cost
6 per impression as stated, and cost per impression when filtered through the proposed reach and frequency
7 statistics.

8 19. For administration costs, we compared the number of claims assumed, and the costs
9 associated with case management and setup, a website and toll-free telephone number, additional
10 communications with class members, claims and opt-out processing, additional processing and reporting,
11 distribution and postage, and any additional or miscellaneous costs. We then compared the total
12 administration costs, and cost-per-claim, as well as the total notice and administration cost, and the total of
13 the notice cost-per-impression and administration cost-per-claim. In this way, we were able to manipulate
14 the bids on a variety of bases to compare them.

15 20. Based on this analysis, and considering its experience administering the *Krommenhock* and
16 *Hadley* settlements, which would give it efficiencies of scale here, we determined P&N was the best choice
17 for administration of this Settlement, subject to the Court's approval.

The Predicted Claims Rate

18 21. To determine a probable claims rate, I averaged the claims rates of the *Krommenhock* and
19 *Hadley* settlements, since they are both recent, both in this district, both administered by P&N, and both
20 concern similar issues and similar recovery as this case.
21

Case	Class Size	Claims	Claims Rate
<i>Krommenhock</i>	20.9 million	335,816	1.61%
<i>Hadley</i>	16.0 million	513,342	3.21%
<i>Average:</i>			2.41%
	3.2 million	77,120	←

22 The average 2.41% claims rate in *Krommenhock* and *Hadley* predicts 77,120 claims here. Accordingly, we
23 asked P&N (and other administrators during the vetting process) to provide estimates and caps for both
24 80,000 and 160,000 claims, representing approximately 2.5% and 5% claims rates. P&N has done so, as
25 follows.
26
27
28

	80,000 Claims (2.5%)	160,000 Claims (5%)
Estimate	\$249,441	\$317,387
Cap ¹⁸	\$299,500	\$362,500

The Cash Awards to Class Members

22. Assuming that the estimated cost of notice and administration is approved and accurate, and that the Court approves the full amount of fees, expenses, and service awards requests, there will be \$855,343 left in the Settlement Fund to distribute as Settlement Payments for claimants, as follows:

Settlement Fund:	\$1,500,000
Notice & Other Administrative Costs	(\$240,461) ¹⁹
Attorneys' Fees	(\$375,000)
Expenses	(\$24,196)
Service Awards	(\$5,000)
Remainder	\$855,343

23. Dividing this among the predicted 77,120 claimants, the average Settlement Payment would be \$11.09. Since the most claimants can initially claim without proof of purchase is \$12,²⁰ unless the claims rate is greater than expected, it is unlikely a pro rata reduction will be necessary. Moreover, this is a fair recovery for claimants. Based on the IRI sales figures, which include units, the average price for the three products is \$3.75 per unit; applying the *Hadley* damages models, damages averages about \$0.13 per unit. Thus, Class Members can claim damages for up to approximately 923 units, or 184 units per year, 15 units per month, or 3.8 units per week. This very likely should provide most claimants complete relief.

Potential *Cy Pres* Recipient for Uncleared Funds

24. Paragraph 4.5 of the Settlement Agreement provides that, after cash awards are distributed

¹⁸ These caps do not include postage because it is difficult to predict how many claimants will choose paper checks over digital options. P&N's best estimate is that postage would add \$7,860 at 80,000 claims, and \$15,720 at 160,000 claims. *See* Schwartz Decl. ¶ 14. In any event, P&N simply passes through the cost of postage (*i.e.*, P&N does not make money on postage).

¹⁹ This is calculated by dividing the 77,120 predicted claims by the 80,000 claims in the estimate (0.964) and multiplying by the estimated \$249,441 at 80,000 claims.

²⁰ A "mock-up" of the claim form (which may be slightly modified in non-material ways if necessary when finalized) is attached as Exhibit 5.

1 to claimants, any amounts remaining uncleared in the Settlement Fund will be donated *cy pres* to the
2 American Heart Association (AHA), whose activities are sufficiently tethered to Plaintiff's claims. *See*
3 *Dennis v. Kellogg Co.*, 697 F.3d 858, 866-67 (9th Cir. 2012). The AHA is a nonprofit organization that
4 funds cardiovascular medical research, educates consumers on healthy living, and fosters appropriate
5 cardiac care in an effort to reduce disability and deaths caused by cardiovascular disease and stroke.
6 Originally formed in New York City in 1924 as the Association for the Prevention and Relief of Heart
7 Disease, it is now a national voluntary health agency. The mission of the organization is "[t]o be a relentless
8 force for a world of longer, healthier lives." *See* <https://www.heart.org/en/about-us>. Particularly relevant
9 here, the AHA promulgates recommended limitations on the amount of added sugars people should
10 consume. The AHA has been approved as a *cy pres* recipient in at least two other similar false advertising
11 cases, *Krommenhock*, and *Zeisel v. Diamond Foods, Inc.*, 2012 WL 4902970, at *2-3 (N.D. Cal. Oct. 16,
12 2012), in which the plaintiff alleged that walnuts were falsely advertised as providing heart health benefits.
13 Judge Koh also granted preliminary approval to the settlement in *Hadley*, in which the AHA is also a *cy*
14 *pres* recipient.

15 **Plaintiff's Participation in the Lawsuit**

16 25. I have been prosecuting consumer class actions for more than 10 years. During that time, I
17 have seen a wide range of attitudes from plaintiffs and putative class representatives. I am pleased to say
18 that the plaintiff in this case, Mr. Curtis Hanson, was probably the most interested and involved plaintiff I
19 can remember working with. Mr. Hanson (to my delight) requested that he be permitted to review all court
20 papers—such as the Rule 12 briefing—and to be advised when there were court proceedings, and to be
21 allowed to observe them, which he has mostly done as a zoom guest. Throughout the litigation, Mr. Hanson
22 has taken the initiative to periodically email me for status updates. Mr. Hanson even made it a point, recently,
23 to meet me in person at the San Francisco federal courthouse, because I had an in-person hearing in another
24 case (*Milan*) there, and he was local and able to meet. Because of his deep interest and active participation
25 in the case, Mr. Hanson was very involved in crafting the Settlement, discussing with me at every step what
26 reasonable outcomes might look like, and carefully reviewing the settlement documents in detail. I can
27 confidently say I believe Mr. Hanson was a *bona fide* purchaser with standing, had no conflicts with the
28

1 class, and has more than adequately fulfilled his duties as a Class Representative,²¹ such that a service award
 2 of \$5,000 is more than fair and reasonable.

3 **Past Distributions**

4 26. Paragraph 11 of the Preliminary Approval portion of the Northern District Procedural
 5 Guidelines for Class Action Settlements calls for information regarding Class Counsel’s past distributions
 6 “for at least one of their past comparable class settlements (i.e. settlements involving the same or similar
 7 clients, claims, and/or issues)[.]” Below sets forth the relevant information for *Krommenhock* and *Hadley*
 8 (in which the claims deadline has passed but the settlement is still pending final approval).

Total Settlement Fund	Total Number of Class Members	Total Number of Class Members Sent Notice	Method(s) of Notice	Number and Percentage of Claim Forms Submitted	Average Recovery Per Class Member or Claimant	Amounts Distributed to Each Cy Pres Recipient	Administrative Costs	Attorneys’ Fees and Costs
<i>Krommenhock</i>								
\$15 M	20.9 M	72.14% (2.12 x freq.)	Online & Print Publication; Direct (~70,000 emails)	335,816 (1.61%)	\$25.28	not yet determined	\$517,836	\$4.5 M fee & \$968k costs
<i>Hadley</i>								
\$13 M	16.0 M	76.86% (2.54 freq.)	Online & Print Publication	513,342 (3.21%)	\$14.09	not yet determined	\$680,283	\$3.9 M fee & \$1.16M costs requested

20 **Class Counsel’s Lodestar**

21 ***Hours Billed***

22 27. Fitzgerald Joseph LLP (“FJ”)²² dedicates its practice almost entirely to prosecuting class
 23 action lawsuits. FJ prosecuted this action on a contingency basis and advanced all out-of-pocket expenses.

24 28. FJ’s timekeepers are myself, partner Melanie Persinger, associate Trevor Flynn, and
 25 _____

26 ²¹ Welch never served discovery on Mr. Hanson, but if it had, he was aware of his obligations, and I believe
 27 he would have been cooperative in responding to discovery requests and providing deposition and trial
 28 testimony.

²² This action was initially filed by The Law Office of Jack Fitzgerald, PC (“LOJF”). In May 2021, LOJF
 merged with another firm to form FJ. See Dkt. No. 35.

1 paralegal Julie Hinton. FJ's practice is to keep contemporaneous records for each timekeeper, and to
2 regularly record time records in the normal course of business. Moreover, FJ's practice is to bill in 6-minute
3 (tenth-of-an-hour) increments. Each timekeeper kept time records in this case consistent with these
4 practices.

5 29. Prior to tallying hours, we reviewed the billing records and made cuts for time entry errors,
6 duplications, and instances where we determined the hours should be reduced or not billed.

7 30. The total time spent by Class Counsel on this matter through September 30, 2021 is 300.8
8 hours, which is summarized in the below tables.

9 ***Hours by Timekeeper***

Timekeeper	Hours	%
Attorneys		
Jack Fitzgerald	72.7	24.2%
Melanie Persinger	55.8	18.6%
Trevor Flynn	113.5	37.7%
Paralegal		
Julie Hinton	58.8	19.5%
Total =	300.8	100%

10 ***Hours by Category***

Category	Hours	%
Investigation & Complaint	119.7	39.8%
Rule 12 Briefing	25.1	8.3%
FAC & Mot. to Strike	24.0	8.0%
Case Management	8.5	2.8%
Discovery	77.7	25.8%
Settlement Negotiations	3.5	1.2%
Motion for Preliminary Approval	42.3	14.1%
31. Total =	300.8	100%

11 ***Billing Rates***

12 32. The current billing rates for the timekeepers on this matter are set forth below.

Timekeeper	Position	Rate
Jack Fitzgerald	Principal	\$825
Melanie Persinger	Partner	\$625
Trevor Flynn	Associate	\$625
Julie Hinton	Paralegal	\$205

13 These rates are largely the same rates that we provided recently in successfully moving for attorneys' fees
14 in *Krommenhock v. Post Foods, LLC*, No. 16-cv-4958-WHO (N.D. Cal.), and in successfully moving for
15 preliminary approval in *Hadley*.²³

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27 ²³ See *Krommenhock* Dkt. No. 297 and the Order granting the motion at Dkt. No. 303; *Hadley* Dkt. No. 377,
28 and the Order granting the motion at Dkt. No. 395. At the time, Ms. Persinger was a Senior Associate and
charged \$600, but has since been promoted to partner, explaining the small increase in her rate.

33. The rates are also consistent both with prevailing rates in the community for attorneys of similar experience, skill, and reputation. Recently, in December 2020, another court in this district found that “opinions from this District and evidence . . . supports awarding the partner rates sought,” approving rates of between \$545 and \$1,280 per hour for twelve billing attorneys, and \$390 and \$405 for paralegals. *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 2020 WL 7626410, at *3 & nn.4-5 (N.D. Cal. Dec. 22, 2020). Another court in this district, more than five years ago, awarded rates higher than those sought here. *See In re High-Tech Employee Antitrust Litig.*, 2015 WL 5158730, at *9 (N.D. Cal. Sept. 2, 2015) (partner rates of \$490 to \$975, non-partner rates of \$310 to \$800, and staff rates of \$190 to \$430)). Other Northern District courts have several other times approved rates higher than those sought here. *See In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *2 (N.D. Cal. Sept. 20, 2018) (finding reasonable “historic rates” ranging from \$350 to \$1,050 for partners and senior counsel, \$300 to \$675 for associates, and \$100 to \$400 for paralegals and other litigation staff); *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.* (“NCAA”), 2017 WL 6040065, at *8 (N.D. Cal. Dec. 6, 2017) (approving hourly rates for partners of \$578 to \$1,035, and rates for associates of \$295 to \$635); *Max Sound Corp. v. Google, Inc.*, 2017 WL 4536342, at *12 (N.D. Cal. Oct. 11, 2017) (approving attorney rates ranging from \$336-\$950 because “[t]hese rates are well in line with the billing rates for attorneys with similar qualifications in the Bay Area” (citing *inter alia Banas v. Volcano Corp.*, 47 F.Supp.3d 957, 965 (N.D. Cal. 2014) (approving hourly rates ranging from \$355 to \$1,095 per hour for partners and associates and \$245 to \$290 per hour for paralegals))).

34. Given the foregoing hours and rates, Class Counsel’s lodestar in this case through September 30, 2021 is \$177,864, which is summarized in the table below. We will incur additional lodestar in preparing for and participating in the preliminary approval hearing; filing motions for final approval; responding to any objections and appeals; and preparing for and participating in the final approval hearing. Accordingly, it is likely our lodestar will ultimately total approximately \$200,000.

Timekeeper	Rate	Hours	Lodestar
Jack Fitzgerald	\$825	72.7	\$59,997.50
Melanie Persinger	\$625	55.8	\$34,875
Trevor Flynn	\$625	113.5	\$70,937.50

Timekeeper	Rate	Hours	Lodestar
Julie Hinton	\$205	58.8	\$12,054
Totals =		300.8	\$177,864

Class Counsel's Expenses

35. My firm advanced all out-of-pocket costs associated with the prosecution of this action. As of the filing of Plaintiff's Motion for Preliminary Approval, we have incurred a total of \$24,196.00.²⁴ They are broken down as follows:

Date	Amount	Description
March 23, 2020	\$400	Filing Fee
October 6, 2020	\$5,400	Payment to Economic and Technology, Inc. for Colin Weir's work on FRE 408 Declaration
October 13, 2020	\$18,126	Payment to IRI for Welch juice sales data for Colin Weir FRE 408 Declaration
Monthly Charge	\$270	Deadlines.com Calendaring (life of case)
Total:	\$24,196.00	

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 4th day of October, 2021, in San Diego, California.

By: /s/ Jack Fitzgerald
Jack Fitzgerald

²⁴ We do not seek reimbursement of postage, legal research resources, PACER, and printing or copying costs.