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COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

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19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF SAN BERNARDINO

21 MASTANE SHALIKAR, individually, and on
22 behalf of all others similarly situated,

23 Plaintiff,

24 vs.

25 SKEETER SNACKS, LLC

26 Defendant.

Case No. CIVDS1702247

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF JOINT
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

*[Declaration of Barbara A. Rohr, Declaration
of Stephanie Stroup, and Declaration of
Tiffaney Janowicz filed concurrently herewith]*

Date: May 24, 2017

Time: 8:30am

Dept.: S26

Judge: Hon. David Cohn

Action Filed: February 8, 2017

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT**

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1 Plaintiff Mastane Shalikaar (“Plaintiff”) and Defendant Skeeter Snacks, LLC
2 (“Defendant”) (together with Plaintiff, herein referred to as the “Parties”) have reached a fair,
3 adequate, and reasonable agreement to resolve this action (“Action”) on a class-wide basis. By
4 this application, the Parties jointly seek preliminary approval of: (1) an arm’s-length, stipulated
5 class action Settlement Agreement and Release (“Settlement Agreement”); (2) Faruqi & Faruqi,
6 LLP as Class Counsel¹ and Plaintiff as Class Representative for settlement purposes only; (3)
7 class notice and related settlement administration documents and deadlines (“Class Notice”); and
8 (4) a Final Approval hearing date.

9 **I. INTRODUCTION**

10 Plaintiff brought this class action, alleging that Defendant falsely and deceptively labeled
11 and advertised certain products as being “All Natural” when they were not (the “Covered
12 Products”²). Plaintiff alleges that he and other consumers suffered injury as a result of those
13 representations, in violation of the California Consumer Legal Remedies Act (“CLRA,” Cal. Civ.
14 Code § 1770, *et seq.*), California Unfair Competition Law (“UCL,” Cal. Bus. Prof. Code §
15 17200, *et seq.*), California False Advertising Law (“FAL,” Cal. Bus. Prof. Code § 17500, *et*
16 *seq.*), and other statutory and common law. The primary relief sought by Plaintiff is monetary
17 relief in the form of restitution for Covered Products purchased by consumers between July 1,
18 2013 and the date Class Notice is provided (“Class Period”) (consumers individually referred to
19 as “Settlement Class Members” and collectively as the “Settlement Class”³). Defendant denies
20 any liability or wrongdoing of any kind associated with the claims alleged in the Action and
21 further contends that for any purpose other than settlement, the claims alleged in the Action are
22 not appropriate for class treatment.

23 _____
24 ¹ All capitalized terms have the same definition as provided in the Settlement Agreement, unless otherwise
specified.

25 ² As defined in the Settlement Agreement, the term Covered Products means any of the following Skeeter Snacks
26 Nut Free products: Chocolate Chip 8oz, Cinnamon Grahams 10oz, Chocolate Grahams 10oz, Chocolate Chip 36ct
27 1oz, Cinnamon Grahams 36ct 1oz, Chocolate Grahams 36ct 1.2oz, Cookie Variety 36ct, Chocolate Chip Family
Pack 8ct 1oz, Graham Variety Family Pack 8ct 1oz, Chocolate Chip Minis – 4/3pack – 8oz, Double Chocolate Minis
– 4/3pack – 8oz, Cookie Variety 4/3pack – 8oz, Honey Grahams – 4/3pack – 10oz, Shortbread – 8 oz, Honey
Graham – 8 oz, and Double Chocolate – 8 oz.

28 ³ Defined further in Section III.A.

1 The Parties engaged in lengthy and informed arm’s-length settlement negotiations
2 beginning in June, 2016. The negotiations followed an extensive, month long investigation of
3 the Covered Products by Plaintiff and Plaintiff’s counsel. During the course of the negotiations
4 the Parties exchanged information, including documents, and were fully informed as to the
5 strength and weakness of their respective legal positions. The result of the negotiations is a fair
6 compromise, and is described in the Settlement Agreement, filed concurrently herewith as
7 Exhibit 1 to the Declaration of Barbara A. Rohr (“Rohr Decl.”).

8 As described in the Settlement Agreement, the Parties have agreed to settle this Action on
9 a nationwide basis. The proposed settlement provides that Defendant will modify its labeling
10 and advertising of the Covered Products and future products by removing any and all “All
11 Natural” and substantially similar representations. Rohr Decl., ¶ 3, Ex. 1 at Art. III, ¶ D.2.
12 Additionally, Defendant has agreed to provide for restitution to Settlement Class Members. *Id.*
13 at ¶ D.1.

14 Because the Settlement Agreement and Class Notice are fair and reasonable, the Parties
15 jointly request that the Court issue an order: (1) preliminarily approving the terms of the
16 proposed Settlement Agreement, (2) provisionally certifying the Settlement Class for settlement
17 purposes only, (3) provisionally appointing Faruqi & Faruqi, LLP as Class Counsel and Plaintiff
18 as Class Representative for settlement purposes only, (4) approving the form, content, and
19 schedule of Class Notice, and (5) scheduling a Final Approval hearing.

20 **II. SUMMARY OF THE LITIGATION**

21 **A. Plaintiff’s Claims**

22 This class action alleges that Defendant made false and misleading claims on its labels
23 and advertising for the Covered Products, in violation of the CLRA, UCL, FAL, and other
24 statutory and common law. Specifically, Plaintiff challenges Defendant’s claims that the
25 Covered Products are “All Natural,” when they contain artificial and/or synthetic ingredients
26 including anhydrous dextrose, lecithin, soy lecithin and/or cocoa (processed with alkali). Class
27 Action Complaint (“CAC”), ¶ 3.

1 **B. Plaintiff's Investigation**

2 Plaintiff and Plaintiff's counsel began investigating Defendant's labeling and advertising
3 of the Covered Products in or around May 2016. Rohr Decl. at ¶ 4. Plaintiff's counsel's
4 investigation included, but was not limited to, the following:

5 (a) Obtaining and reviewing electronic images of Defendant's website and other
6 marketing platforms, including images of the Covered Products and all representations
7 made on the label and packaging of the Covered Products;

8 (b) Obtaining and reviewing relevant legal precedent regarding similar misleading
9 representations on product labels;

10 (c) Obtaining and reviewing legal, nutritional, scientific, and manufacturing information
11 regarding anhydrous dextrose, lecithin, soy lecithin and/or cocoa (processed with alkali);

12 (d) Obtaining and reviewing financial information regarding the Covered Products,
13 including their sales and units sold during the Class Period;

14 (e) Extensive legal research to evaluate the prospective merits and weaknesses of the
15 case;

16 (f) Preparation and review of the CAC, ancillary documents, and the Parties' instant
17 motion; and

18 (g) Analysis of potential class-wide damages.

19 **C. Procedural Summary and Settlement Discussions**

20 Following the initial investigation by Plaintiff and Plaintiff's counsel, on May 20, 2016,
21 Plaintiff notified Defendant of its alleged violations of California consumer and common law
22 with respect to the advertising and labeling of the Covered Products ("CLRA Notice and
23 Demand Letter"). *Id.* at ¶ 5. The CLRA Notice and Demand Letter detailed the product labeling
24 and advertising claims at issue. *Id.* Plaintiff advised Defendant that she intended to proceed
25 with filing a class action lawsuit should Defendant fail to correct and repair the alleged
26 violations. *Id.* On June 17, 2016, Defendant's counsel responded to Plaintiff's letter, denying
27 Plaintiff's allegations. *Id.* at ¶ 6. Over the course of the next several months, the Parties engaged

1 in hard-fought, protracted, arm's-length negotiations to craft a resolution of this Action on a
2 class-wide basis, which ultimately culminated in the Settlement Agreement executed in March
3 2017. *Id.* at ¶ 7.

4 **III. THE PROPOSED SETTLEMENT**

5 The salient terms of the Settlement Agreement are summarized below.

6 **A. The Settlement Class**

7 The Settlement Agreement provides for the certification of the following Settlement
8 Class for settlement purposes only:

9 All Persons who purchased any of the Covered Products in the United States, its
10 territories, or at any United States military facility or exchange during the Class
Period.

11 Excluded from the Settlement Class are all persons who validly opt out of the Settlement
12 Class in a timely manner, counsel of record (and their respective law firms) for the Parties,
13 Defendant and any of its parents, affiliates, subsidiaries, independent service providers and all of
14 their respective employees, officers, and directors; the presiding judge in this Action; and any
15 natural person or entity that entered into a release with Defendant, prior to the Effective Date,
16 concerning any Covered Products. *See Id.* at ¶ 3, Ex. 1 at Art. I, ¶ Z.

17 **B. The Settlement Consideration**

18 **1. Injunctive Relief**

19 As part of the Settlement Agreement, Defendant has agreed to substantial equitable relief
20 in the form of changes to the labeling and advertising of the Covered Products, to the following
21 extent:

22 Defendant agrees to remove the statement "All Natural" and all other
23 substantially similar statements from both (i) the label of the Covered Products
24 and any of Defendant's future products containing anhydrous dextrose, lecithin,
25 soy lecithin and/or cocoa (processed with alkali); and (ii) any and all websites,
26 advertisements, and other forms of marketing associated with said products.

1 Defendant agrees to remove “All Natural” representations from the labeling the
2 next time the labels are printed for the Covered Products. Defendant will not
3 generate any additional advertisements or other forms of marketing with the
4 statement “All Natural,” or all other substantially similar statements, for the
5 Covered Products, as of the Effective Date of this agreement, and will remove the
6 statement “All Natural,” and all other substantially similar statements, from its
7 website within 60 days after the Effective Date.

8 *Id.* at Art. III, ¶ D.2.

9 **2. Monetary Relief**

10 In addition to the advertising and labeling changes, the Settlement Agreement provides
11 for substantial restitution to Settlement Class Members. *Id.* at ¶ D.1. Specifically, Settlement
12 Class Members may seek a full refund for every Covered Product purchased during the Class
13 Period, for which they can present Written Proof of Purchase.⁴ *Id.* at Art. III, ¶D.1. Settlement
14 Class Members that do not submit Written Proof of Purchase may seek a total payment of \$3.00.
15 *Id.*

16 **C. Releases**

17 Plaintiff’s and Settlement Class Members’ consideration is in the form of a release of the
18 claims alleged, or that could have been alleged, in this Action. Pursuant to the terms of the
19 Settlement Agreement, the Settlement Class releases the following claims:

20 [A]ny and all claims, demands, actions, and causes of action of any kind or nature
21 whatsoever, whether at law or equity, known or unknown, direct, indirect, or
22 consequential, liquidated or unliquidated, foreseen or unforeseen, developed or
23 undeveloped, arising under common law, regulatory law, statutory law, or
24 otherwise, including but not limited to unjust enrichment, fraud breach of warranty
25 express or implied, violation of California Civil Code 1750 et seq., violation of

26
27 ⁴ As defined in the Settlement Agreement. *Id.* at ¶ 3, Ex. 1 at Art. I, ¶ CC.

1 California Business and Professions Code Sections 17200 et seq. and 17500 et seq.,
2 and any related or similar state consumer protection statutes, claims for restitution,
3 disgorgement of profits, injunctive and declaratory relief, arising during the Class
4 Period, and arising out of or relating to the advertising, packaging, labeling,
5 marketing, promotion, sale or distribution of the Covered Products, including all
6 claims which were alleged or which could have been alleged by Plaintiff, Class
7 Counsel, the Settlement Class and/or any Settlement Class Member against the
8 Released Parties in the Action, or any other legal action, whether those claims are
9 asserted individually or on a class-wide basis. However, this definition expressly
10 excludes claims for personal injury.

11 *Id.* at Art. I, ¶X & Art. III, ¶C.1.

12 **D. Class Notice and the claims process**

13 Defendant has agreed to provide notice to the Settlement Class through print publication
14 in a widely circulated newspaper, *USA Today* (“Publication Notice”), a dedicated settlement
15 website (www.skeetersnacksettlemnt.com), and toll-free telephonic support (collectively the
16 “Notice Plan”). *Id.* at Art. V, ¶A. Settlement Class Members will receive notice of their right to
17 submit a claim for payment, as well as the opportunity to object to the settlement or opt out.
18 Counsel for the Parties agree that the proposed Notice Plan provides reasonable notice in light of
19 the nature of the consumers’ claims, the amount of restitution at stake, the limitations on the
20 scope of the release, and the limited resources of the Defendant to fund Class Notice. *Id.* at ¶ 8;
21 Declaration of Stephanie Stroup (“Stroup Decl.”), at ¶ 3.

22 **1. Notice Plan**

23 Details regarding the Notice Plan are set forth in the Settlement Agreement as well as the
24 Declaration of Tiffany Janowicz (“Janowicz Decl.”), Senior Vice President of Rust Consulting,
25 Inc. (“Rust Consulting”). The Parties have developed the Notice Plan with Rust Consulting, a
26 firm with 40 years of legal administration services that specializes in developing class action
27

1 notice plans and administering class action settlements.⁵ Defendant is unable to provide direct
2 notice to any potential Settlement Class Members, as it does not maintain lists of purchasers of
3 the Covered Products, nor is it able to obtain such lists. Stroup Decl. at ¶ 3; California Rules Of
4 Court (“C.R.C”) 3.766(f) (“If personal notification is unreasonably expensive or the stake of
5 individual class members is insubstantial, or if it appears that all members of the class cannot be
6 notified personally, the court may order a means of notice reasonably calculated to apprise the
7 class members of the pendency of the action—for example, publication in a newspaper...”).
8 Consequently, the Notice Plan focuses on disseminating notice through robust Publication Notice
9 and an informative settlement website to reach Settlement Class Members nationwide. *See*
10 Janowicz Decl. at ¶¶ 6-7.

11 **2. Publication Notice and Long-Form Notice**

12 The proposed Publication Notice in a widely circulated newspaper, *USA Today*, is
13 attached as Exhibit “C” to the Settlement Agreement. The proposed Long Form Notice, which
14 will be available on the settlement website or by calling a toll-free telephone number to request a
15 copy, is attached as Exhibit “B” to the Settlement Agreement. The Publication Notice and Long-
16 Form Notice were designed in accordance with the Federal Judicial Center’s (“FJC”) “plain
17 language” guidelines. Rohr Decl. at ¶ 9. The Publication Notice and Long-Form Notice also
18 comport with all aspects of C.R.C. 3.766, the Due Process Clause of the Constitution, and also
19 the guidance for effective notice articulated in the FJC’s Manual for Complex Litigation, 4th. *Id.*

20 **3. Settlement Website and Toll-Free Telephone Support**

21 The Publication Notice and Long-Form Notice will direct consumers to
22 www.skeetersnacksettlemnt.com, an Internet website dedicated to the settlement and the
23 claims process, where Settlement Class Members can review the Long-Form Notice, settlement
24 documentation, and other relevant court documents, as well as fill out a Claim Form for
25 payment. The proposed Claim Form is attached as Exhibit “A” to the Settlement Agreement.

26 _____
27 ⁵ <http://www.rustconsulting.com/> (last visited on March 30, 2017).

1 The settlement website will be designed and maintained by Rust Consulting. *See Id.* at ¶ 3, Ex.
2 1, Art. V, A.1. In addition, Rust Consulting will maintain a toll free call-in number for the
3 settlement through which Settlement Class Members can obtain information about the Settlement
4 Agreement and obtain a hardcopy of the Long-Form Notice or Claim Form. *Id.* at A.1.

5 **4. Costs of Class Notice and Administration**

6 The Settlement Agreement provides that the notice and administration costs associated
7 with the Settlement Agreement will be paid by Defendant. *Id.*, at Art. IV.B. Rust Consulting
8 estimates that the costs of notice and administration will be approximately \$50,000. Janowicz
9 Decl. at ¶ 10.

10 **E. Incentive Award to Plaintiff**

11 The Settlement Agreement contains a provision that Plaintiff will apply for an incentive
12 award of up to \$1,500 for her services and efforts on behalf of the Settlement Class. *Id.*, Ex. 1,
13 Art. III, ¶E. This amount will be paid by Defendant. *Id.* This award is fair, adequate, and
14 reasonable given Plaintiff’s involvement in the background investigation, the litigation, and the
15 settlement process. In accordance with California class action procedure, Plaintiff will submit an
16 application for an incentive award in connection with the Parties’ motion for Final Approval of
17 the Settlement Agreement.

18 **F. Attorneys’ Fees and Costs**

19 The Settlement Agreement provides that Plaintiff’s counsel will request, and Defendant
20 will not object to, an award of reasonable attorneys’ fees and costs not to exceed \$80,000. *Id.*,
21 Ex. 1, Art. III, ¶F.1. In accordance with California class action procedure, Plaintiff will submit a
22 detailed attorneys’ fees and costs application in connection with the Parties’ motion for Final
23 Approval. Given the value of the monetary relief, the injunctive relief obtained, the overall
24 success achieved, the timing in which such success was achieved, and counsel’s lodestar, the
25 attorneys’ fees sought are fair and reasonable.

1 **IV. ARGUMENT**

2 **A. Legal Standard for Preliminary Approval**

3 California courts favor settlement, particularly in class actions and other complex cases in
4 which substantial resources can be conserved by avoiding the time, cost and rigors of formal
5 litigation. See 2 Newberg on Class Actions, Settlement of Class Actions § 11.41 (3d ed. 1992)
6 (collecting cases); *Stambaugh v. Super. Ct.*, 62 Cal. App. 3d 231, 236 (1976); *Class Plaintiffs v.*
7 *City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d
8 943, 950 (9th Cir. 1976). In reviewing a class action settlement, a court must determine if the
9 settlement is fair, adequate, and reasonable, but has broad discretion in making this
10 determination. See *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996) (“The court
11 must determine the settlement is fair, adequate and reasonable.”); see also *In re Microsoft I-V*
12 *Cases*, 135 Cal. App. 4th 706, 723 (2006). Because voluntary settlements are highly favored by
13 the law, courts should be deferential to the good faith negotiations of experienced counsel
14 whenever possible. *In re Xoma Corp. Sec. Litig.*, Master File No. C-91-2252 TEH, 1992 U.S.
15 Dist. LEXIS 10502, at *9 (N.D. Cal. July 10, 1992). Absent a finding of fraud or collusion,
16 settlement agreements negotiated and endorsed by experienced counsel are presumptively fair
17 and reasonable. See *Dunk*, 48 Cal. App. 4th at 1802.

18 In reviewing a proposed settlement, the Court’s inquiry “must be limited to the extent
19 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
20 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
21 whole, is fair, reasonable and adequate to all concerned.” *Dunk*, 48 Cal. App. 4th at 1801
22 (quoting *Officers for Justice v. Civil Serv. Comm’n of City and Cty of S. F.*, 688 F.2d 615, 625
23 (9th Cir. 1982)). Thus, the purpose of the preliminary evaluation of a class action settlement is
24 to determine whether the proposed settlement is within the range of possible approval, and thus
25 whether notice to the class of the terms and conditions of the settlement and the scheduling of a
26 formal fairness hearing are worthwhile. See 2 Newberg on Class Actions, Settlement of Class
27 Actions §11.25; *Wershba v. Apple Comput., Inc.*, 91 Cal. App. 4th 224, 245-46 (2001).

1 **B. The Settlement Agreement is Fair, Reasonable and Adequate and it Should**
2 **be Preliminarily Approved**

3 The starting point of the Court’s inquiry is the Settlement Agreement. *See, e.g., Dunk*, 48
4 Cal. App. 4th at 1800-01. To this end, there is a presumption that the settlement is fair,
5 reasonable and adequate if (i) the settlement is a product of arm’s-length negotiations, (ii)
6 investigation and discovery are sufficient to allow counsel and the court to act intelligently, and
7 (iii) counsel is experienced in the litigation. *Id.* at 1802. The Settlement Agreement meets that
8 standard.

9 **1. The Settlement Agreement is the product of arm’s-length negotiations**
10 **by experienced counsel**

11 Experienced counsel for both Parties, operating at arm’s-length, have weighed the
12 strengths and weaknesses of this Action, examined all of the issues and, as a result, endorse the
13 proposed Settlement Agreement. *See Rohr Decl.* at ¶ 10; *Stroup Decl.* at ¶ 4. As noted,
14 counsel’s endorsement is entitled to great weight following arm’s-length settlement negotiations.
15 *See Dunk*, 48 Cal. App. 4th at 180 (“Due regard should be given to what is otherwise a private
16 consensual agreement between the parties.”); *see also Nat’l Rural Telecomms. Coop. v.*
17 *DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Destefano v. Zynga, Inc.*, No. 12-cv-
18 04007-JSC, 2016 U.S. Dist. LEXIS 17196, at *43-44 (N.D. Cal. Feb. 11, 2016). The record
19 provided to the Court evidences the lengthy, careful investigation, and informal discovery
20 conducted and obtained by Plaintiff and Plaintiff’s counsel in this Action, as well as extensive
21 negotiations between experienced counsel for the Parties. As a result, Plaintiff’s counsel was
22 able to negotiate significant labeling changes and substantial cash restitution for the Settlement
23 Class Members.

24 During the course of the negotiations, each party considered, among other things, the
25 risks and expenses of further litigation, the prospect of losing on the merits, and the complexities
26 associated with the present state of the law. *Rohr Decl.* at ¶ 11; *Stroup Decl.* at ¶ 5. Plaintiff’s
27 counsel also considered the benefits that the Settlement Agreement would convey to the

1 Settlement Class and the public, and the present monetary value of the equitable relief. Rohr
2 Decl. at ¶ 11. All of those factors, taken in conjunction, dictate that the Settlement Agreement is
3 (i) the product of arm's-length negotiations and (ii) in the best interests of the Settlement Class.
4 *See Dunk*, 48 Cal. App. 4th at 1803.

5 **2. The Settlement Agreement is fair and reasonable in light of the**
6 **Parties' respective legal positions**

7 In order to be considered fair and reasonable, a proposed class action settlement does not
8 have to provide 100 percent of the possible damages that could be recovered if the case
9 ultimately was tried to a successful conclusion. *See Wershba*, 91 Cal.App.4th at 250
10 (“Compromise is inherent and necessary in the settlement process. Thus, even if ‘the relief
11 afforded by the proposed settlement is substantially narrower than it would be if the suits were to
12 be successfully litigated,’ this is no bar to a class settlement because ‘the public interest may
13 indeed be served by a voluntary settlement in which each side gives ground in the interest of
14 avoiding litigation.’”). Rather, a settlement is considered against the backdrop of the facts and
15 circumstances surrounding a particular case. *See Id.* at 246-50. When judged against that
16 standard, the Settlement Agreement – which secures substantial equitable relief and restitution
17 for the Settlement Class - provides a fair, reasonable and adequate settlement for the Settlement
18 Class.

19 **a. Liability issues and the “Battle of the Experts”**

20 As with any contested class action, the proofs on the merits would be subject to
21 significant scrutiny. In particular, Defendant had substantiation for the “All Natural”
22 representations that appeared in the labeling and advertising for Covered Products, and
23 Defendant's counsel shared with Plaintiff's counsel that information. *See Stroup Decl.* at ¶ 6.
24 While Plaintiff raised some (and was prepared to raise more) factual and legal evidence
25 questioning that substantiation, there certainly was no guarantee that the evidence and testimony
26 that Plaintiff would proffer would be accepted over Defendant's evidence. The case would
27 likely have been reduced to a classic battle of the experts over whether the challenged
28

1 ingredients were in fact all natural. *See, Morales v. Conopco, Inc.*, No. 2:13-2213 WBS EFB,
2 2016 U.S. Dist. LEXIS 90424, at *22 (E.D. Cal. July 11, 2016) (approving settlement, noting
3 that “establishing that all class members paid a price premium that was directly related to the
4 product being ‘natural,’ rather than because of some other characteristic of the product, and
5 quantifying this premium would have involved a battle of the experts.”). In the event the defense
6 prevailed, the Settlement Class would be left with nothing.

7 Against that backdrop, the settlement achieved here is more than fair, reasonable, and
8 adequate. Indeed, it is a tremendous result for Plaintiff, the putative class, and the public. The
9 primary goal in this litigation was to achieve class-wide equitable relief in the form of revisions
10 to the Covered Products’ labeling and advertisements with respect to the “All Natural” claims.
11 That goal was achieved by this Settlement Agreement, as Defendant has agreed to significant
12 revisions to its labeling and advertising of the Covered Products, and this Settlement Agreement
13 will create an enforceable legal obligation with respect to those changes. In sum, given the facts
14 and circumstances of this case, the Settlement Agreement is demonstrably fair, reasonable and
15 adequate.

16 **b. Difficulty of proving “advertising injury” and a price premium**

17 The concept of “advertising injury” is a hotly contested issue in false advertising actions
18 and presents a potential major roadblock to achieving class certification and any recovery here.
19 Because Plaintiff and other consumers received some value from the Covered Products at issue,
20 the crux of Plaintiff’s claims is that consumers would not have paid as much for the Covered
21 Products if they knew that the representations on Defendant’s labeling and advertising were false
22 and deceptive. *See* CAC, ¶ 4. Thus, even if Plaintiff was ultimately successful in establishing
23 liability for the challenged claims, the calculation of restitution and damages would not amount
24 to a return of the full purchase price for the Covered Products. *See Korea Supply Co. v.*
25 *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003); *Shersher v. Super. Ct.*, 154 Cal. App. 4th
26 1491, 1498 (2007). Defendant intended to argue that even if Plaintiff’s allegations about
27 Defendant’s labeling and advertising claims were correct, Defendant would be entitled to a “set

1 off” of the value for the Covered Products, and Plaintiff could not present any reliable damages
2 model to tie the alleged misrepresentation to a specific price premium. *See* Stroup Decl. at ¶ 7.
3 In other words, there was a significant risk that Plaintiff would not be able to show “[t]he
4 difference between what the plaintiff paid and the value of what the plaintiff received” on a
5 class-wide basis or appropriately tie any “price premium” to the alleged misrepresentations. *See,*
6 *e.g., In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009); *In re Tobacco Cases II*, 240
7 Cal. App. 4th 779, 795 (2015) (“a party seeking restitution must return any benefit received.”).

8 The difficulties in making the restitution/damages/price premium calculation may prevent
9 class certification of Plaintiff’s claims, or greatly reduce or negate any potential recovery if the
10 case were tried to verdict. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (At
11 class certification, plaintiff must show that “damages are capable of measurement on a classwide
12 basis.”); *see also Herron v. Best Buy Stores, LP*, No. 2:12-cv-02103-TLN-CKD, 2016 U.S. Dist.
13 LEXIS 52486, at *28 (E.D. Cal. Apr. 18, 2016) (Denying class certification where plaintiff failed
14 to present a restitution/damages model that appropriately tied a price premium attributable to
15 defendant’s use of the misleading advertisements and product labeling omissions.).

16 The manufacturer’s suggested retail price (“MSRP”) for Defendant’s top-selling Covered
17 Product, the 8 oz. package of Chocolate Chip cookies, is priced at \$2.99. Stroup Decl. at ¶ 8.
18 This is less than the \$3.00 payment Defendant proposes to remit to Settlement Class Members
19 who submit a Claim Form but have no written proof of purchase, and was why the Parties
20 believe this is a reasonable amount to pay Settlement Class Members. *Id.*

21 c. Risk of continued litigation

22 One relevant factor in determining whether the proposed Settlement Agreement is fair,
23 reasonable, and adequate is the risk of continued litigation balanced against the certainty and
24 immediacy of settlement recovery for the class. *See Dunk*, 48 Cal. App. 4th at 1801-02.
25 Although Plaintiff believes that the Action against Defendant is strong, such confidence must be
26 tempered by the fact that the Settlement Agreement is beneficial (providing a significant
27 immediate return) and that there were significant risks of less or no recovery, particularly in a

1 complex case such as this one. Plaintiff’s counsel is convinced that this Settlement Agreement is
2 in the best interests of the Settlement Class based on the negotiations and the detailed knowledge
3 of the issues presented, and many of the risks described herein. In negotiating the Settlement
4 Agreement, Plaintiff’s counsel reviewed and carefully considered how to best protect the
5 Settlement Class through equitable relief so as to deter future injurious conduct, and compensate
6 Settlement Class Members with restitution for purchases of the Covered Products. Rohr Decl. at
7 ¶ 12. Specifically, Plaintiff’s counsel balanced the proposed Settlement Agreement, including all
8 of the injunctive relief provisions and the cash payments to Settlement Class Members, against
9 the probable outcome of class certification and a trial on the merits. *Id.* at ¶ 13. The risks of
10 class certification, trial, and the normal “perils” of litigation, as well as the specific defenses and
11 issues discussed above, were all weighed in reaching the proposed Settlement Agreement. *Id.*
12 Further, the time value of the present Settlement Agreement, the fact that changes will be made
13 to the Covered Products’ labeling and advertising, and the refunds that will be provided to
14 Settlement Class Members were also carefully considered by Plaintiff’s counsel in agreeing to
15 the proposed Settlement Agreement. *Id.*

16 In ruling on a preliminary approval motion, “[t]he Court should consider the vagaries of
17 litigation and compare the significance of immediate recovery by way of the compromise to the
18 mere possibility of relief in the future, after protracted and expensive litigation. In this respect,
19 ‘[i]t has been held proper to take the bird in hand instead of a prospective flock in the bush.’”
20 *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974). While Plaintiff’s counsel
21 believes Settlement Class Members’ claims are meritorious, they are experienced and realistic,
22 and understand that the outcome of a trial and appeals that may follow are uncertain in both
23 outcome and duration - all risks that should be considered in assessing the fairness of the
24 Settlement Agreement, which guarantees an immediate award to all participating claimants.
25 Plaintiff has achieved a certain and worthwhile benefit for the Settlement Class in exchange for
26 the mere possibility of recovery at some indefinite time in the future.

1 Further, because Defendant has limited resources, the risks of delayed or non-payment to
2 Class Members if Plaintiff was successful at trial are substantial. *Torrise v. Tucson Elec. Power*
3 *Co.*, 8 F.3d 1370, 1375-76 (9th Cir. 1993) (poor financial condition of defendant weighs heavily
4 in favor of approval of class action settlement); *Crago v. Mitsubishi Elec. Corp. (In re Cathode*
5 *Ray Tube (CRT) Antitrust Litig.)*, MDL No. 1917, 2015 U.S. Dist. LEXIS 170525, at *190-92
6 (N.D. Cal. Dec. 17, 2015) (same); *Spann v. J.C. Penney Corp.*, No. SA CV 12-0215 FMO
7 (KESx), 2016 U.S. Dist. LEXIS 137184, at *20-21 (C.D. Cal. Sep. 30, 2016) (uncertainty
8 concerning defendant's financial stability supports the reasonableness of the settlement);
9 *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) (court can consider the
10 defendant's ability to pay a judgment larger than that provided by the proposed settlement).

11 Because the Settlement Agreement provides immediate and significant relief, without the
12 attendant risks of continued litigation, it warrants this Court's approval.

13 **3. The extent of the investigation, litigation, and discovery supports the** 14 **Settlement Agreement**

15 As discussed above, Plaintiff's counsel thoroughly investigated the claims and evaluated
16 the strengths and weaknesses of this case before reaching the Settlement Agreement. A detailed
17 list of Plaintiff's counsel's factual and legal investigation can be found in Section II(b), *supra*.

18 In sum, the proposed settlement came only after this case was fully investigated and then
19 negotiated for approximately ten months by experienced counsel. This litigation has reached the
20 stage where Plaintiff and Plaintiff's counsel have a thorough understanding of the strengths and
21 weaknesses of the case sufficient to support the reasonableness of the Settlement Agreement.
22 This assessment is entitled to great weight, and strongly supports preliminary approval of the
23 proposed Settlement Agreement. *See Dunk*, 48 Cal. App. 4th at 1800.

24 **C. The Court Should Grant Provisional Class Certification Of The Settlement** 25 **Class And Appointment of Class Representative and Class Counsel**

26 Plaintiff requests that the Court provisionally certify the proposed Settlement Class for
27 settlement purposes only. Pursuant to C.R.C. 3.769(d), "the Court may make an order approving

1 or denying certification of a provisional settlement class after the preliminary settlement
2 hearing.” Unlike the standards applied in ordinary certification proceedings, under California
3 law the prerequisites for class certification are substantively relaxed for “settlement classes.” *See*
4 *Wershba*, 91 Cal. App. 4th at 237-44. Instead, heightened concerns over the appropriateness of
5 California settlement classes are satisfied by a “careful fairness review of the settlement by the
6 trial court.” *Id.* at 240. Nevertheless, even when subjected to the higher scrutiny of the ordinary
7 certification prerequisites,⁶ it is clear that the proposed Settlement Class merits provisional
8 certification. Indeed, the two requirements necessary to maintain a class under California Code
9 of Civil Procedure § 382 – an ascertainable class and a well-defined community of interest - are
10 easily met. Moreover, there is no question that a class action is the superior method of
11 adjudication in this matter.

12 **1. The Settlement Class is ascertainable**

13 To determine whether a class is ascertainable, the court examines: (1) the class definition;
14 (2) the means available for identifying the class members; and (3) whether the class is
15 sufficiently numerous. *Reyes v. Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1271 (1987).

16 **a. The Settlement Class definition sufficiently identifies all**
17 **Settlement Class Members**

18 Class members can be readily identified when the class is defined by “objective
19 characteristics” and “common transactional facts.” *Evans v. Lasco Bathware*, 178 Cal. App. 4th
20 1417, 1422 (2009). Here, the Settlement Class is defined as follows: “All Persons who
21 purchased any of the Covered Products in the United States, its territories, or at any United States
22 military facility or exchange during the Class Period.” *See* Rohr Decl., Ex. 1 at Art I, ¶Z. The
23 Settlement Class is objectively defined, and is limited by geography and by the time period that
24 the labeling and advertising of the Covered Products contained the allegedly misleading

25 _____
26 ⁶ The question of class certification is “essentially a procedural one that does not ask whether an action is legally or
27 factually meritorious.” *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 439-40 (2000). Plaintiffs are not required to prove
28 their case at the certification stage. Rather, they must simply demonstrate that the matter is suitable for resolution on
a class wide basis. *Id.* at 438-39, 443. “Since the judicial system substantially benefits by the efficient use of its

1 representation. Because the labeling and advertising for all the Covered Products contains the
2 same uniform representation, the Settlement Class is defined in such a way that self-
3 identification is possible. Accordingly, the Settlement Class definition sufficiently identifies all
4 Settlement Class Members. *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 916
5 (2001) (granting class certification where “the class [wa]s precise, objective, and [could] be
6 determined from public records and Kaufman’s own records”).

7 **b. The Settlement Class is sufficiently numerous**

8 A class is sufficiently numerous to warrant class treatment when it is impracticable to
9 bring all members of the class before the court. *See* Cal. Civ. Proc. Code § 382. The exact
10 number of parties necessary for a class action is indefinite and may be “construed liberally.”
11 *Rose v. City of Hayward*, 126 Cal.App.3d 926, 934 (1981) (granting class certification); *see also*
12 *Hebbard v. Colgrove*, 28 Cal. App. 3d 1017, 1030 (1972) (“[T]here is no set number required as
13 a matter of law for the maintenance of a class action”). In *Vasquez*, the Supreme Court held that
14 a class of approximately 200 persons was sufficiently numerous. *Vasquez v. Super. Ct.*, 4 Cal.
15 3d 800, 810 (1971). Notably, classes have been certified comprising of as low as forty-two,
16 thirty-five and even ten individuals. *See Rose*, 126 Cal. App. 3d at 926; *Collins v. Rocha*, 7 Cal.
17 3d 232 (1972); *Bowles v. Super. Ct.*, 44 Cal. 2d 574 (1955). Here, given the sales volume of the
18 Covered Products, the Parties estimate that the Settlement Class is sufficiently numerous to
19 support certification. Accordingly, the numerosity element is clearly established.

20 **2. A well-defined community of interest exists**

21 The California Supreme Court identifies three factors which embody the community of
22 interest requirement: (1) predominating questions of law or fact; (2) class representatives with
23 claims or defenses typical of the class; and (3) class representatives who can adequately
24 represent the Class. *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470 (1981). Each is satisfied
25 in the instant case.

26
27 resources, class certifications should not be denied so long as the absent class members’ rights are adequately
protected.” *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 474 (1981).

1 **a. Common issues of law and fact predominate**

2 If the Action proceeded to the class certification stage, the Court would determine
3 whether “common questions are sufficiently pervasive to permit adjudication in a class action
4 rather than in a multiplicity of suits.” *Vasquez*, 4 Cal. 3d 800 at 810. Common questions can
5 predominate when they are either sufficiently numerous or substantial. *See Collins*, 7 Cal. 3d at
6 238. Class certification is proper where the common issues represent the “principal issues in any
7 individual action, both in terms of time to be expended on their proof and of their importance.”
8 *Vasquez* at 810. If those principal common issues are tried separately, “a multiplicity of legal
9 actions dealing with identical basic issues would be required in order to permit recovery by each
10 class member.” *Id.* Class certification thus does not require that common questions be
11 completely dispositive as to all potential members of the Class. *Rosack v. Volvo of Am. Corp.*,
12 131 Cal. App. 3d 741, 754 (1982). As a general rule, if the defendant’s liability can be
13 determined by facts common to all class members, a class will be certified even if the members
14 must individually prove damages. *Hicks*, 89 Cal. App. 4th at 916. This is the prototypical case
15 for class treatment because common evidence can be used to resolve the common question of
16 whether Defendant engaged in unlawful, unfair, and/or fraudulent conduct in violation of the
17 CLRA, UCL, FAL, and other statutory the common law, in an effort to induce consumers to
18 purchase the Covered Products. The present Action is based on a uniform representation made
19 prominently on the front panel of Covered Products, capable of being seen by every Settlement
20 Class Member. Accordingly, it is indisputable that the propriety of these representations would
21 be “principal issues in any individual action,” and, thus, that common issues predominate. *See*
22 *Vasquez* at 810.

23 **b. Plaintiff’s claims are typical of those of the Settlement Class**
24 **Members**

25 The typicality requirement does not require “that the class representative must have
26 identical interests with the class members. The only requirements are that common questions of
27 law and fact predominate and that the class representative be similarly situated.” *Richmond*, 29

1 Cal. 3d at 470. “Most differences in situation or interest among class members should not bar
2 class suit.” *Wershba*, 91 Cal. App. 4th at 238. Here, Plaintiff’s claims are typical of those of the
3 proposed Settlement Class because her claims pose the same questions of law and fact as those
4 of the Settlement Class Members and arise from the same representation on the Covered
5 Products’ packaging and in advertisements that give rise to the claims of all Settlement Class
6 Members. Thus, there is a sufficient relationship between the injuries to Plaintiff and the
7 conduct which affects the entire Settlement Class.

8 **c. Plaintiff and Plaintiff’s counsel will adequately represent the**
9 **Settlement Class**

10 “Adequacy of representation depends on whether the plaintiff’s attorney is qualified to
11 conduct the proposed litigation and the plaintiff’s interests are not antagonistic to the interest of
12 the class.” *McGhee v. Bank of America*, 60 Cal. App. 3d 442, 450 (1976). Plaintiff’s interests
13 are not antagonistic to the interests of the Settlement Class Members because her claims arise
14 from the same standardized conduct of Defendant as those of the proposed Settlement Class, and
15 Plaintiff seeks remedies equally applicable and beneficial to the Settlement Class. Additionally,
16 Plaintiff has retained competent and experienced counsel in both class action and consumer
17 fraud-related litigation. Plaintiff’s counsel has successfully prosecuted numerous class action
18 cases, including cases involving alleged false advertising of consumer products. *See Rohr Decl.*
19 *at ¶15.* Plaintiff’s Counsel is capable of, and committed to, prosecuting this action vigorously on
20 behalf of the Settlement Class. *Id.* Accordingly, Plaintiff satisfies the adequacy requirement.
21 *See McGhee*, 60 Cal.App.3d at 450.

22 **3. A class action is the superior method of adjudication**

23 A class action must be the superior method of adjudication to any available alternatives
24 by providing “substantial benefits to litigants and the courts.” *Fireside Bank v. Super. Ct.*, 40
25 Cal. 4th 1069, 1089 (2007). First, a class action is superior when “the benefits of certification
26 are not measured by reference to individual recoveries alone.” *Linder v. Thrifty Oil Co.*, 23 Cal.
27 4th 429, 445 (2000). Indeed, class action allows for “several salutary by-products, including a

1 therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate
2 business enterprises by curtailing illegitimate competition, and avoidance to the judicial process
3 of the burden of multiple litigation involving identical claims.” *Vasquez*, 4 Cal.3d at 808.

4 Second, a class action is superior when the amount at issue for an individual plaintiff is
5 not enough to warrant an individual filing. *See Newberg on Class Actions* § 4:30 (4th ed. 2002).
6 This would create one of two possible unsavory effects. On the one hand, plaintiffs may be
7 discouraged from taking individual action, thus allowing an unscrupulous seller to retain the
8 benefits of its wrongful conduct. *Vasquez* at 808. On the other hand, plaintiffs may yet take
9 individual action, but in doing so, burden the courts with duplicative proceedings regarding the
10 same arguments and evidence, resulting in “a multiplicity of trials conducted at enormous
11 expense to both the judicial system and the litigants.” *See Sav-on Drug Stores, Inc. v. Super. Ct.*,
12 34 Cal. 4th 319, 340 (2011).

13 Here, a class action is the superior method of adjudication. As noted above, the proposed
14 Settlement Class consists of sufficiently numerous class members such that any attempt to try
15 their claims individually would unnecessarily clog the court system and waste judicial resources.
16 Adjudicating the case using class action procedures would prove the most efficient means of
17 reaching the most just outcome for all parties involved.

18 **D. The Court Should Approve the Proposed Notice Plan**

19 The type of notice to which a member of a class is entitled depends upon the information
20 available to the parties about that person. *See, e.g., Mullane v. Central Hanover Bank & Trust*
21 *Co.*, 339 U.S. 306, 318 (1950); *Schroeder v. City of N. Y.*, 371 U.S. 208, 212 (1962). That said,
22 the Court has a great deal of discretion in applying the prevailing notice standard. As one
23 California court recently held, “the manner of giving notice is subject to the trial court’s virtually
24 complete discretion.” *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 57 (2008).

25 Because the identity and contact information for Settlement Class Members is not known
26 or available to Defendant, notice of the settlement by publication in *USA Today*, a nationally
27 circulated newspaper, is adequate. C.R.C. 3.766(f) (“If personal notification is unreasonably

1 expensive or the stake of individual class members is insubstantial, or if it appears that all
 2 members of the class cannot be notified personally, the court may order a means of notice
 3 reasonably calculated to apprise the class members of the pendency of the action—for example,
 4 publication in a newspaper...”). See, e.g., *Guttmann v. Ole Mexican Foods, Inc.*, No. 14-cv-
 5 04845-HSG, 2015 U.S. Dist. LEXIS 154046, at *3, 18-19 (N.D. Cal. Nov. 13, 2015) (granting
 6 preliminary approval when defendant does not sell directly to consumers but implemented robust
 7 publication notice in *USA Today*). “The standard is whether notice has a reasonable chance of
 8 reaching a substantial percentage of the class members.” *Wershba*, 91 Cal. App. 4th at 251. It is
 9 not necessary to show that notice reached each member of a nationwide class. *Id.* The proposed
 10 Publication Notice was designed by the Parties in concert with a settlement administrator with
 11 significant expertise in consumer class settlements, and easily meets all the applicable
 12 requirements. Additionally, the Publication Notice will be posted on the settlement website and
 13 will contain the toll-free telephone number for support, to further ensure Settlement Class
 14 Members receive the best practicable notice.

15 Accordingly, Plaintiff requests that the Court approve the Notice Plan and the associated
 16 settlement claim documents.

17 **V. PROPOSED SCHEDULE OF EVENTS**

18 As set forth in the Settlement Agreement, the Parties propose the following schedule of
 19 events:

Event	Proposed Date
Publication Notice Period Begins	Within 20 days after entry of Preliminary Approval Order _____, 2017
Claims/Objection/Opt-out Deadline	Within 60 days after publication of notice and Settlement website _____, 2017
Class Counsel briefs in support of Final Approval, Award of Attorneys’ Fees & Costs Due	No later than 21 days prior to Final Approval Hearing _____, 2017

1	Reply Papers Due	, 2017
2	Responses to Any Objections Due	No later than 2 days prior to the Final Approval Hearing
3		, 2017
4	Final Approval Hearing	No earlier than 30 days after Objection/Opt- out Deadline
5		, 2017
6		

7 **VI. CONCLUSION**

8 The Parties respectfully submit that the proposed Settlement Agreement is fair, adequate,
9 reasonable, and is in the best interests of the Settlement Class. Under the applicable criteria and
10 guidelines, the Court should (1) preliminarily approve the terms of the proposed Settlement
11 Agreement, (2) provisionally certify the Settlement Class for settlement purposes only, (3)
12 provisionally appoint Faruqi & Faruqi, LLP as Class Counsel and Plaintiff as Class
13 Representative for settlement purposes only, (4) approve the form and schedule of Class Notice,
14 and (5) schedule a Final Approval hearing.

15
16 DATED: April 6, 2017

FARUQI & FARUQI, LLP

17
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