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

STEPHEN HADLEY, MELODY DIGREGORIO,
ERIC FISHON, KERRY AUSTIN, and
NAFEESHA MADYUN, on behalf of themselves,
all others similarly situated, and the general public,

Plaintiffs,

v.

KELLOGG SALES COMPANY,

Defendant.

Case No. 5:16-cv-04955-LHK

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

[Fed. R. Civ. P. 23(e)]

Judge: Hon. Lucy H. Koh
Date: November 18, 2021
Time: 1:30 p.m.
Location: Courtroom 8 – 4th Floor

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1 **NOTICE OF MOTION**

2 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD: PLEASE TAKE
3 NOTICE THAT, pursuant to Fed. R. Civ. P. 23(e), the Northern District of California’s Procedural
4 Guidelines for Class Action Settlements (“Settlement Guidelines”), and the Court’s June 15, 2021 Order
5 Granting Preliminary Approval (Dkt. No. 395, the “PA Order”), on November 18, 2021, at 1:30 p.m., or as
6 soon thereafter as may be heard, Plaintiffs will move the Court, the Honorable Lucy H. Koh presiding, for
7 an Order: (1) finally certifying the Settlement Class; (2) finally approving the Settlement as fair, reasonable,
8 and adequate to the Class; (3) directing the parties to undertake the obligations set forth in the Settlement
9 Agreement that arise out of the Court’s final approval; (4) entering Judgment; and (5) maintaining
10 jurisdiction over this matter for purpose of enforcing the Judgment. This Motion is based on this Notice of
11 Motion; the below Memorandum; the concurrently-filed declarations of Jack Fitzgerald (“Fitzgerald Decl.”)
12 and Brandon Schwartz (“Schwartz Decl.”), and all exhibits thereto; the parties’ March 9, 2021 Settlement
13 Agreement (“SA”¹); all prior pleadings and proceedings; and any additional evidence and argument
14 submitted in support of the Motion.

15 **ISSUES TO BE DECIDED**

16 Whether the Court should finally certify the Settlement Class, grant the proposed Settlement final
17 approval, direct the parties to undertake the obligations set forth in the Settlement Agreement, enter
18 Judgment, and maintain jurisdiction over the matter for purpose of enforcing the Judgment.

19 **MEMORANDUM OF POINTS & AUTHORITIES**

20 **I. INTRODUCTION**

21 On June 15, 2021, the Court preliminarily approved a nationwide class action settlement between
22 Plaintiffs Stephen Hadley, Melody DiGregorio, Eric Fishon, Kerry Austin, and Nafeesha Madyun, on the
23 one hand, and Defendant Kellogg Sales Company, on the other. *See* PA Order ¶ 3 (Finding that the
24 “Settlement Agreement is fair, reasonable, adequate,” “is the result of serious, informed, non-collusive,
25 arms-length negotiations, involving experienced counsel familiar with the legal and factual issues of this
26 case,” and “meets all applicable requirements of law.”). The Settlement resolves allegations that Kellogg
27

28 ¹ Attached as Exhibit 1 to Declaration of Jack Fitzgerald in Support of Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 378-1, the “PA Fitzgerald Decl.”).

1 violated California and New York consumer protection laws, and breached warranties, by misleadingly and
 2 unlawfully marketing high-sugar cereals with health and wellness claims. *See generally* Dkt. No. 376,
 3 Fourth Am. Compl. (“FAC”).

4 Notice has now been provided to the Class in accordance with the approved Notice Plan. *See*
 5 Schwartz Decl. ¶¶ 2-3. This included (1) a media notice plan resulting in 432,596,170 digital impressions;
 6 (2) publication notice in *People Magazine* and a press release through PR Newswire’s US1 and National
 7 Hispanic Newswire, picked up by 208 media outlets, reaching a total potential audience of 134,000,000; and
 8 (3) notices with third-party websites TopClassActions.com and ClassAction.org, which drove 324,738 class
 9 members to the Settlement Website. *See* Schwartz Decl. ¶¶ 5-8 & Exs. B-E. As a result, the Notice Plan
 10 “delivered a 76.89% reach with an average frequency of 2.54,” for “a total reach *exceeding* the originally
 11 estimated 75% reach.” *Id.* ¶ 15. The Settlement Website, informational email address, and toll-free hotline
 12 (IVR) that P&N set up also received significant use. *See id.* ¶¶ 10-11, 14 (As of September 17, 2021, more
 13 than 999,000 unique users have made more than 5.5 million views of the Settlement Website, and hundreds
 14 of calls have been made to the IVR).

15 The Class’s response to the Settlement has been overwhelmingly positive. While 513,342 Class
 16 Members made valid claims—representing a robust 3.21% claims rate²—only 3 have opted out, and none
 17 have objected. *Id.* ¶¶ 17-20 & Ex G. If the Court awards the attorneys’ fees, costs, service awards, and Class
 18 Administrator fees requested, claimants will receive between \$2.35 and \$31.23, depending on their quintile,
 19 *see id.* ¶ 22 & Table 3, with an average refund of approximately \$14.09, *see* Fitzgerald Decl. ¶ 2.

20 As reflected by the high number of claims, few exclusions, and lack of objections, this is a fair,
 21 reasonable, and adequate Settlement for the Class, while eliminating inherent risk after more than four years
 22 of hotly-contested litigation, and months away from trial.³ Because the settlement provides an excellent result

23 _____
 24 ² The Class Administrator estimated the class size to be 16 million. *See* Dkt. No. 381, Declaration of
 25 Brandon Schwartz in Support of Motion for Preliminary Approval ¶ 12. The claims rate here is more than
 26 the 2.82% predicted, *see* PA Fitzgerald Decl. ¶¶ 14-17, and almost double the 1.78% claims rate in
 27 *Krommenhock v. Post Foods, LLC*, *see* Fitzgerald Decl. ¶ 4.

28 ³ The procedural, litigation, and settlement history was detailed in Plaintiffs’ initial Motion for Preliminary
 Approval (which was denied without prejudice), *see* Dkt. No. 325 at 2, and that history was referenced in
 Plaintiffs’ renewed Motion for Preliminary Approval, which was granted, *see* Dkt. No. 377 (“PA Mot.”) at
 2-3. The Court should finally certify the Settlement Class for the same reasons set forth therein. *See*
Raquedan v. Volume Servs., Inc., 2020 WL 10574547, at *2 (N.D. Cal. Oct. 28, 2020) (Koh, J.) (“For the

1 for the Class and eliminates the risk and expense of continued litigation and lengthy appeals, Plaintiffs
2 respectfully request the Court grant the Settlement final approval and enter Judgment.

3 **II. LEGAL STANDARD**

4 “Judicial policy favors settlement in class actions and other forms of complex litigation where
5 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.” *Espinosa*
6 *v. Cal. Coll. of San Diego, Inc.*, 2018 WL 1705955, at *5 (S.D. Cal. Apr. 9, 2018) (citing *In re Wash. Pub.*
7 *Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1387 (D. Ariz. 1989)). A class action settlement must be
8 approved by the Court before it can become effective. *See* Fed. R. Civ. P. 23(e). The process for court
9 approval of class action settlements is comprised of three steps: (1) preliminary approval, (2) dissemination
10 of notice to the class which provides class members the opportunity to object or opt out and, (3) a final
11 approval hearing, at which the court decides whether the proposed settlement should be approved as fair,
12 adequate, and reasonable to the class and whether plaintiff’s request for attorneys’ fees, expense
13 reimbursement and service awards should be approved. *See* Manual for Complex Litigation (Fourth) §
14 21.632-35; *see also In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 721680, at *16 (N.D. Cal. Jan.
15 28, 2016). The first two steps are complete; Plaintiffs now seek an Order finally approving the Settlement.

16 “In evaluating a proposed class action settlement under Federal Rule of Civil Procedure 23(e), the
17 standard is whether the settlement ‘is fundamentally fair, adequate and reasonable.’” *In re Anthem, Inc.*
18 *Data Breach Litig.*, 327 F.R.D. 299, 316–17 (N.D. Cal. 2018) (Koh. J.) [“*Anthem*”] (citing *In re Heritage*
19 *Bond Litig.*, 546 F.3d 667, 674-75 (9th Cir. 2008); *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375
20 (9th Cir. 1993)). “In this Circuit, a district court examining whether a proposed settlement comports with
21 Rule 23(e)(2) is guided by the eight ‘*Churchill* factors,’” namely:

22 (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely duration of
23 further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the
24 amount offered in settlement; (5) the extent of discovery completed and the stage of the
25 proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
26 participant; and (8) the reaction of the class members of the proposed settlement.

27 _____
28 reasons stated in the Preliminary Approval Order, the Court finds and determines that the proposed Class,
as defined in the definitions section of the Settlement Agreement and conditionally certified by the
Preliminary Approval Order, meets all of the legal requirements for class certification.”).

1 *Kim v. Allison*, 8 F.4th 1170, 1178 (9th Cir. 2021) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654
 2 F.3d 935, 946 (9th Cir. 2011) (citing *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004));
 3 *see also Anthem*, 327 F.R.D. at 317 (same).

4 Courts need not weigh all factors, “and different factors may predominate in different factual
 5 contexts.” *Rieckborn v. Velti PLC*, 2015 WL 468329, at *3 (N.D. Cal. Feb. 3, 2015) (quoting *Torrissi*, 8 F.3d
 6 at 1376). Further:

7 While considering all these interests, “the court’s intrusion upon what is otherwise a private
 8 consensual agreement negotiated between the parties to a lawsuit must be limited to the extent
 9 necessary to reach a reasoned judgment that the agreement is not the product of fraud or
 10 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken
 as a whole, is fair, reasonable and adequate to all concerned.”

11 *Id.*, at *4 (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982)).

12 **III. THE SETTLEMENT SHOULD BE FINALLY APPROVED AS FAIR, REASONABLE, AND**
 13 **ADEQUATE FOR THE CLASS**

14 A consideration of the *Churchill* factors demonstrates the Settlement is fair, reasonable, and adequate,
 15 warranting final approval.

16 **A. The Strength of the Case, and the Risk, Expense, Complexity, and Likely Duration of**
 17 **Further Litigation**

18 “In determining whether the settlement is fair, reasonable, and adequate” the Court first “balance[s]
 19 the risks of continued litigation, including the strengths and weaknesses of plaintiff’s case, against the
 20 benefits afforded to class members, including the immediacy and certainty of recovery.” *Knapp v. Art.com,*
 21 *Inc.*, 283 F. Supp. 3d 823, 831-32 (N.D. Cal. 2017) (citing *Larsen v. Trader Joe’s Co.*, 2014 WL 3404531,
 22 at *4 (N.D. Cal. July 11, 2014); *LaGarde v. Support.com, Inc.*, 2013 WL 1283325, at *4 (N.D. Cal. Mar.
 23 26, 2013)). Given “all the normal perils of litigation as well as the additional uncertainties inherent in
 24 complex class action.” *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 179-80 (5th Cir. 1979), “unless [a
 25 proposed] settlement is clearly inadequate,” a court should normally find “its acceptance and approval are
 26 preferable to lengthy and expensive litigation with uncertain results.” *Knapp*, 283 F. Supp. 3d at 832 (citing
 27 *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (internal quotation
 28 marks omitted)); *see also Rojas v. Zaninovich*, 2015 WL 3657172, at *12 (E.D. Cal. June 11, 2015) (Courts

1 consider, among other things, the “normal perils of litigation, including the merits of the affirmative
2 defenses asserted by Defendant, the difficulties of complex litigation, [and] the lengthy process of
3 establishing specific damages.”).

4 Here, “[w]hile [] [P]laintiffs . . . believe their claims are strong, they acknowledge,” as detailed in
5 their Motion for Preliminary Approval, “that they would face significant risks should the case proceed
6 through litigation.” *See Larsen*, 2014 WL 3404531, at *4 (record citation omitted); *compare* PA Mot. at 17-
7 18. Moreover, as the Honorable William H. Orrick noted with respect to the similar case against Post, this
8 would necessarily be “a complex case to prove [at trial] given its breadth and scope,” requiring “pro[of] that
9 reasonable consumers would be misled by each particular label used for each Product during the class
10 period.” *See Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 566 (N.D. Cal. 2020); *see also*
11 *Krommenhock v. Post Foods, LLC*, 2020 WL 2322993, at *3 (N.D. Cal. May 11, 2020) (noting that “the
12 expert work and trial in this case will be extensive and complex” (record citation omitted)). Of course,
13 Kellogg “vigorously denied liability and challenged all of [] [P]laintiffs’ claims.” *See Larsen*, 2014 WL
14 3404531, at *4 (record citation omitted).

15 For example, Kellogg argued that the evidence supporting Plaintiffs’ claims that the cereals are
16 unhealthy is “minority” science, or that there is a “controversy” about the health effects of excess sugar
17 consumption, and supported its position with the testimony of Dr. James Rippe, who has performed clinical
18 studies involving sugar consumption. *Compare Hadley v. Kellogg Sales Co.*, 2019 WL 3804661, at *16-17
19 (N.D. Cal. Aug. 13, 2019) [*“Hadley IP”*] (relying on similar argument to grant summary judgment in favor
20 of Kellogg on punitive damages). Kellogg also argued that the challenged labeling claims were immaterial
21 and supported its position with the testimony of Stanford and University of Virginia professors, Dr. Itamar
22 Simonson and Dr. Ronald Wilcox. In addition, Kellogg had numerous arguments for why it would be difficult
23 or impossible for Plaintiffs to reliably prove any amount of damages, including both fundamental and
24 numerous methodological challenges to Plaintiffs’ damages models.⁴ Finally, even if Plaintiffs prevailed at

25 _____
26 ⁴ The Court approved of Plaintiffs’ conjoint damages model and set out a succinct, two-part test for whether
27 such a model adequately accounts for supply-side considerations. *See Hadley v. Kellogg Sales Co.*, 324 F.
28 Supp. 3d 1084, 1105 (N.D. Cal. 2018) [*“Hadley P”*]. But defendants have continued to vigorously contest
whether that is correct, *see Maldonado v. Apple, Inc.*, 2021 WL 1947512, at *21-23 (N.D. Cal. May 14,
2021) (discussing issue in detail and noting split in case law), scoring occasional victories, *see, e.g., In re*
Volkswagen ‘Clean Diesel’ Mktg., Sales Practices, & Prod. Liab. Litig., 2020 WL 6688912, at *7 (N.D. Cal.

1 trial, Kellogg would press numerous issues on appeal, especially relating to class certification, Plaintiffs’
2 conjoint damages model, and NLEA preemption of the challenged “heart healthy” claims.

3 The Settlement, by contrast, “achieves a definite and certain result for the benefit of the Settlement
4 Class[,]” making it “preferable to continuing litigation in which the Settlement Class would necessarily
5 confront substantial risk, uncertainty, delay, and cost.” *See Donald v. Xanitos, Inc.*, 2017 WL 1508675, at
6 *2 (N.D. Cal. Apr. 27, 2017). Thus, in light of “the significant risks that lie ahead . . . [at] trial, it is reasonable
7 for the parties at this stage to agree that the actual recovery realized and risks avoided here outweigh the
8 opportunity to pursue potentially more favorable results.” *See Larsen*, 2014 WL 3404531, at *4. Because
9 “[t]he settlement avoids the risks that the [P]laintiffs would not succeed in demonstrating that [Kellogg]
10 failed to comply with state consumer protection laws,” “this factor weighs in favor of final approval of the
11 settlement.” *See id.*; *see also Rieckborn*, 2015 WL 468329, at *4-5 (the “first two [Churchill] factors weigh
12 in favor of approval” where “Plaintiffs contend that their claims have significant merit but acknowledge a
13 number of risks and uncertainties should they proceed,” including that “Defendants have adamantly denied
14 liability and have asserted from the outset that they possess absolute defenses to all of plaintiffs’ claims,”
15 and that “[p]roving damages would also entail substantial uncertainty . . . depend[ing] . . . on which, if any,
16 of the four alleged partial corrective disclosures plaintiffs are ultimately able to rely,” making “further
17 litigation . . . likely to be costly and time-intensive, with no guarantee of a more beneficial outcome for class
18 members as a result”); *Nguyen v. Radiant Pharms. Corp.*, 2014 WL 1802293, at *2 (C.D. Cal. May 6, 2014)
19 (finding first two *Churchill* factors met where, “although [the plaintiffs’] claims were quite strong,” there
20 were factual challenges facing them at trial, including “challenges [with] [] damages”).

21 **B. The Amount of Settlement**

22 “This factor examines the benefits to class members.” *Larsen*, 2014 WL 3404531, at *4 (citing
23 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 574 (9th Cir. 2004)). “Assessing the fairness, adequacy,

24 Nov. 12, 2020). The Court also approved Plaintiffs’ hedonic regression damages model, which doubled the
25 damages for “heart healthy” claims compared to their conjoint damages model. *See Hadley II*, 2019 WL
26 3804661, at *24. But the Court had been skeptical of such models in the past, *see Brazil v. Dole Packaged*
27 *Foods, LLC*, 2014 WL 5794873, at *11 (N.D. Cal. Nov. 6, 2014); *Werdebaugh v. Blue Diamond Growers*,
28 2014 WL 7148923, at *12 (N.D. Cal. Dec. 15, 2014), had deferred ruling on the model in its Class
Certification Order, *see Hadley I*, 324 F. Supp. 3d at 1111, and noted the “Kellogg’s criticisms go to the
weight of Mr. Weir’s regression analysis,” 2019 WL 3804661, at *24, so that Kellogg would have ample
fodder for cross-examination.

1 and reasonableness of the amount offered in settlement is not a matter of applying a ‘particular formula.’”
 2 *Knapp*, 283 F. Supp. 3d at 832 (citing *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).
 3 Instead, “[w]hen considering the fairness and adequacy of the amount offered in settlement, ‘it is the
 4 complete package taken as a whole, rather than the individual component parts, that must be examined for
 5 overall fairness.’” *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) (quoting
 6 *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 527). Further, “it is well-settled law that a proposed settlement
 7 may be acceptable even though it amounts to only a fraction of the potential recovery that might be available
 8 to the class members at trial.” *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 527; *cf. City of Detroit v.*
 9 *Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) (“[T]here is no reason, at least in theory, why a
 10 satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the
 11 potential recovery.”). Finally, that a “Settlement Agreement also provides for injunctive relief” is an
 12 important consideration in evaluating its benefit, since “class members that choose to continue doing
 13 business with [the defendant] will benefit from this aspect as well.” *See Knapp*, 283 F. Supp. 3d at 833.

14 Here, the Settlement’s \$13,000,000 common fund for a nationwide Class of approximately 16 million
 15 Members, is fair, reasonable, and adequate—especially in light of the robust injunctive relief obtained for
 16 public and Class’s benefit, *see* PA Mot. at 5-6, 23. Assuming the Court approves or awards the full amount
 17 of notice and administration costs, attorneys’ fees and costs, and service awards requested, Class Member
 18 claimants will divide the remaining approximately \$7.2 million for cash refunds of between \$2.35 and \$31.23
 19 per claimant (with an average refund of \$14.09 per claimant). *See* Schwartz Decl. ¶ 22 & Table 3;⁵ Fitzgerald
 20 Decl. ¶ 2. These amounts claimants will receive represent significant recoveries in relation to potential trial
 21 damages, where Plaintiffs would have to show “the difference between the prices customers paid and the
 22 value of the [products] they bought—in other words, the ‘price premium’ attributable to [Defendant’s
 23 advertising claims].” *See Brazil v. Dole Packaged Foods, LLC*, 660 F. App’x 531, 534 (9th Cir. 2016).
 24 Plaintiffs’ expert, Colin B. Weir, estimated maximum trial damages of \$10 million to \$13.6 million (with
 25 maximum trial damages for a hypothetical nationwide class of \$113 million to \$156 million). *See* Dkt. No.

27 ⁵ As reflected in Table 3, depending on their quintile, nearly all claimants (i.e., other than those few who
 28 submitted receipts for purchases that exceed the highest quintile) will receive the following refunds: Quintile
 1: \$2.35; Quintile 2: \$6.90; Quintile 3: \$11.85; Quintile 4: \$18.83; and Quintile 5: \$31.23. *See id.*

1 380, Declaration of Colin B. Weir in Support of Mot. for Preliminary Approval ¶ 14, Tables 2 & 3. Using
 2 the largest number, \$156 million divided among 16 million Class Members is \$9.75 each. Claimants’ average
 3 recovery under the Settlement, almost 50% higher, is therefore excellent, particularly given the risks and
 4 expenses associated with trial and appeals.

5 Because the Settlement amount is a fair, reasonable, and adequate result for the Class, this factor
 6 weighs in favor of approval. *See Broomfield v. Craft Brew Alliance, Inc.*, 2020 WL 1972505, at *9 (N.D.
 7 Cal. Feb. 5, 2020) (approving settlement where Class Members would receive between \$1.25 to \$2.75 per
 8 unit purchased, for a maximum of \$10 without proof of purchase); *Fitzhenry-Russell v. Coca-Cola Co.*, 2019
 9 WL 11557486, at *6 (N.D. Cal. Oct. 3, 2019) (approving settlement fund of \$2,450,000 that would pay
 10 restitution of \$0.80 per unit, up to \$10.40 (thirteen units) without proof of purchase); *Hendricks v. Starkist*
 11 *Co.*, 2016 WL 5462423, at *5 (N.D. Cal. Sept. 29, 2016) (approving settlement in which class members
 12 would receive \$1.97 cash or \$4.43 voucher per claim, and noting that the “settlement amount, while
 13 constituting only a single-digit percentage of the maximum potential exposure, is reasonable given the stage
 14 of the proceedings and the defenses asserted”); *see also Hilsley v. Ocean Spray Cranberries, Inc.*, 2020 WL
 15 520616, at *6 (S.D. Cal. Jan. 31, 2020) (finding \$1.00 recovery per bottled purchased to be “an excellent
 16 result” considering the fraction of purchase price recoverable at trial); *Beck-Ellman v. Kaz USA, Inc.*, 2013
 17 WL 10102326, at *6 (S.D. Cal. June 11, 2013) (Factor weighed in favor of approval where “Class members
 18 may each recover up to \$20 in reimbursements, although Kaz Heating Pads sold during the class period for
 19 around \$10 to \$20 per pad” and “[t]he settlement also include[d] substantial injunctive relief relating to
 20 Plaintiffs’ claims, valued by economics professor Anthony Cox to be worth as much as \$10,726,000.” (record
 21 citations omitted)); *cf. De Leon v. Ricoh USA, Inc.*, 2020 WL 1531331, at *9 (N.D. Cal. Mar. 31, 2020)
 22 (granting final approval where “[i]n granting preliminary approval the Court concluded that the estimated
 23 payout to class members was fair in relation to the risks of continued litigation . . . and there [wa]s nothing
 24 in the final approval materials that change[d] the Court’s analysis on that score”).

25 **C. Extent of Discovery Completed and Stage of Proceedings**

26 “The extent of discovery completed and the state of the proceedings at the time of settlement is a
 27 strong indicator of whether the parties have sufficient understanding of each other’s cases to make an
 28 informed judgment about their likelihood of prevailing.” *Lane v. Brown*, 166 F. Supp. 3d 1180, 1190 (D.

1 Or. 2016). Thus, “[a] court is more likely to approve a settlement if most of the discovery is completed
2 because it suggests that the parties arrived at a compromise based on a full understanding of the legal and
3 factual issues surrounding the case.” *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 527 (internal quotation
4 marks and citation omitted). “For that reason, ‘[a] settlement following sufficient discovery and genuine
5 arms-length negotiation is *presumed fair*.’” *Lane*, 166 F. Supp. 3d at 1190 (emphasis added) (quoting *Nat’l*
6 *Rural Telecomms. Coop.*, 221 F.R.D. at 528).

7 A presumption of fairness applies here because the parties litigated for more than four years,
8 including extensive motion practice; fact and expert discovery were complete; only trial remained; and the
9 Settlement was reached through *seven* in-person arms-length negotiations with the assistance of court-
10 sponsored mediator, Mark Petersen; JAMS mediator, Hon. James F. Holderman (Ret.); and Magistrate
11 Judge Hon. Nathanael Cousins. *See* PA Mot. at 15-16. Yet even absent such a presumption, it is clear that
12 “[b]y th[e] late stage of the litigation” at which the Settlement was reached, “both sides had a strong
13 understanding of the strengths and weaknesses of each other’s case,” such that this factor “strongly favors
14 approval.” *See Lane*, 166 F. Supp. 3d at 1185, 1190 (granting final approval where “[a]fter
15 almost four years of litigation, extensive fact and expert discovery, and prior unsuccessful efforts to resolve
16 the dispute, the parties engaged in lengthy settlement negotiations a few months before trial and signed a
17 Proposed Settlement Agreement”); *see also Gaudin v. Saxon Mortgage Servs., Inc.*, 2015 WL 7454183, at
18 *6 (N.D. Cal. Nov. 23, 2015) (factor supported final approval where plaintiff “conduct[ed] extensive
19 discovery and investigation (before and after class certification), reviewing approximately 25,000 pages of
20 [Defendant’s] documents, and participating in three separate rounds of settlement negotiations” (internal
21 quotation marks and record citations omitted)); *Booth v. Strategic Realty Tr., Inc.*, 2015 WL 6002919, at *5
22 (N.D. Cal. Oct. 15, 2015) (factor favored final approval where “among other things, [plaintiffs] review[ed]
23 more than 150,000 pages of documents produced by Defendants and non-parties, analyz[ed], with the
24 assistance of an expert, data produced by Defendants, prepar[ed] for and participat[ed] in mediation, and
25 negotiat[ed] the details of the Settlement Agreement for over two months” (internal quotation marks and
26 record citations omitted)).

1 **D. The Experience and Views of Class Counsel**

2 The Ninth Circuit “ha[s] held that “[p]arties represented by competent counsel are better positioned
3 than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation,”
4 *Rodriguez*, 563 F.3d at 967 (quoting *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)). In
5 determining whether a settlement is fair and reasonable, “[t]he judgment of experienced counsel regarding
6 the settlement is [therefore] entitled to great weight.” *White v. Experian Info. Sols., Inc.*, 2009 WL
7 10670553, at *12 (C.D. Cal. May 7, 2009) (citing *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671
8 F. Supp. 819, 822 (D. Mass 1987); *Linney v. Cellular Alaska P’ship*, 1997 WL 450064, at *5 (N.D. Cal.
9 1997); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980)). As a result, “[t]he
10 recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.” *Id.* (quoting *Boyd*
11 *v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)).

12 Here, Class Counsel has considerable experience in consumer class actions, and particularly those
13 involving the false advertising of foods, especially as healthy. Moreover, Class Counsel has been litigating
14 several similar cases during the pendency of this action and has therefore been exposed to a wide variety of
15 information about the claims and defenses, and ultimately the potential upside and risks attendant to this.
16 PA Fitzgerald Decl. ¶¶ 36-37. Because Class Counsel has substantial experience with complex class actions
17 generally, and an intimate understanding of the relevant facts and issues here, and strongly endorses the
18 Settlement, *id.* ¶ 36, this factor favors final approval. *See Larsen*, 2014 WL 3404531, at *5 (factor favored
19 final approval where “Plaintiffs’ counsel ha[d] successfully represented consumers both as litigation class
20 and settlement class counsel numerous times, including cases involving food mislabeling,” and “believe[d]
21 approval [wa]s in the best interests of the putative settlement class.”).

22 **E. The Presence of a Governmental Participant**

23 “There is no governmental participant here.” *See Knapp*, 283 F. Supp. 3d at 833. Because, however,
24 P&N “notified officials of the proposed settlement pursuant to CAFA . . . and no government entity has
25 raised an objection,” this factor “favors settlement.” *See id.* (citing *Schuchardt v. Law Office of Rory W.*
26 *Clark*, 314 F.R.D. 673, 685 (N.D. Cal. 2016); *Holman v. Experian Info. Sols., Inc.*, 2014 WL 7186207, at
27 *3 (N.D. Cal. Dec. 12, 2014); *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *14 (N.D.
28

1 Cal. Apr. 22, 2010)); *compare* Schwartz Decl. ¶ 4 (No state Attorney Generals have objected after receiving
2 CAFA notice of the Settlement).

3 F. The Reactions of the Class Members

4 “The reaction of the class to the settlement is overwhelmingly positive,” with a robust 513,324 valid
5 claims filed (representing a 3.21% rate compared to the 2.82% rate predicted, *see* PA Fitzgerald Decl. ¶¶
6 14-17), only three opt-outs, and no objections,⁶ this factor thus “strongly favors final approval.” *See*
7 *Edwards v. Nat’l Milk Producers Fed’n*, 2017 WL 3623734, at *2, *8 (N.D. Cal. June 26, 2017) (Factor
8 favored approval where “307,396 class members had submitted claims online, and an additional 125 class
9 members had submitted paper claim forms,” yet “only eight objections and one request for exclusion were
10 received out of the millions of class members receiving notice.”), *aff’d sub nom.*, *Edwards v. Andrews*, 846
11 Fed. App’x 538 (9th Cir. 2021). That is because “[a] low number of opt-outs and objections in comparison
12 to class size is typically a factor that supports settlement approval.” *Noll v. eBay, Inc.*, 309 F.R.D. 593, 608
13 (N.D. Cal. 2015) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (“[T]he fact that
14 the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least
15 some objective positive commentary as to its fairness”)); *see also Larsen*, 2014 WL 3404531, at *5 (“The
16 participation rate and positive response of the class weigh[ed] in favor of finding that the settlement is
17 favorable to the class members” where “a total of 59,830 class members [] submitted claim forms, twenty-
18 three [] opted out, and sixteen [] objected”); *Zepeda v. PayPal, Inc.*, 2017 WL 1113293, at *15 (N.D. Cal.
19 Mar. 24, 2017) (“The Ninth Circuit has held that the number of class members who object to a proposed
20 settlement is a factor to be considered.” (citing *Mandujano v. Basic Vegetable Prods. Inc.*, 541 F.2d 832,
21 837 (9th Cir. 1976))).

22 “[T]he absence of a large number of objections to a proposed class action settlement raises a strong
23 presumption that the terms of a proposed class settlement action are favorable to the class members,” *Larsen*,
24 2014 WL 3404531, at *5 (quoting *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 529), and courts
25 “appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members

26
27 ⁶ Plaintiffs’ Motion for Attorneys’ Fees, Costs, and Service Awards and supporting Declaration (Dkt. Nos.
28 398-99) were publicly filed on August 3, 2021 and posted to the Settlement Website the next morning. Class
Members thus had full access to the motion for five weeks before the objection deadline, but no Class
Member has objected to any aspect of the motion. Fitzgerald Decl. ¶ 3.

1 object to it,” *id.* (quoting *Create-A-Card, Inc. v. Intuit, Inc.*, 2009 WL 3073920, at *15 (N.D. Cal. Sept. 22,
2 2009)). “This ‘strong presumption’ of fairness arises here, because . . . [no] objections and [only three]
3 request[s] for exclusion were received out of the millions of class members receiving notice.” *See Edwards*,
4 2017 WL 3623734, at *8; *see also* Schwartz Decl. ¶¶ 5-9, 17-20; *supra* n.2.

5 The absence of any objections and exceedingly low opt-out rate (0.00001875%) strongly favors final
6 approval here, since “[t]hese statistics indicate a favorable reaction by class members and their overall
7 satisfaction with the Settlement.” *See Noll*, 309 F.R.D. at 608 (factor favored approval where “of over
8 1,188,000 potential Class Members, only 97 [] opted out” and “only three objections were filed (including
9 one that was not timely), translating into an objection rate of 0.00025%” (citing *Custom LED LLC v. eBay*,
10 *Inc.*, 2013 WL 6114379, at *9 (N.D. Cal. Nov. 20, 2013) (granting final approval and characterizing 0.04%
11 exclusion rate, with one objection, as “overwhelmingly positive” reaction); *Chun–Hoon v. McKee Foods*
12 *Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal.2010) (4.86% opt-out rate strongly supported approval)); *see*
13 *also Knapp*, 283 F. Supp. 3d at 834 (factor favored final approval where “[t]he settlement administrator
14 received valid opt-outs from 452 class members, which amount[ed] to less than .03 percent of the class
15 members who received notice,” making “[i]t [] apparent that the ‘overwhelming majority of the class’ had
16 nothing to say about the fairness of the settlement.” (quotation omitted)).⁷

17 While the low opt-out and nonexistent objection rates indicate the majority of the Class approved of
18 the Settlement and chose to remain in the Settlement Class, the 3.21% claims rate is fairly strong, and at
19 least “on par with other consumer cases, and does not otherwise weigh against approval.” *See Schneider v.*
20 *Chipotle Mexican Grill, Inc.*, 2020 WL 6484833, at *9 (N.D. Cal. Nov. 4, 2020) (approving settlement with
21 0.83% claims rate) (citing *Broomfield*, 2020 WL 1972505, at *7 (approving settlement with response rate
22 of “about two percent”)). Because “consumer class actions tend to result in claims rates in the low single
23 digits,” *Rael v. Children’s Place, Inc.*, 2020 WL 434482, at *9 (S.D. Cal. Jan. 28, 2020), the Court should

24 ⁷ *See also Stonehocker v. Kindred Healthcare Operating LLC*, 2021 WL 1643226, at *5 (N.D. Cal. Apr. 27,
25 2021) (finding “[t]he reaction of the class was overwhelmingly positive” where “the Court received only
26 three opt-outs and no objections”); *Thomas v. MagnaChip Semiconductor Corp.*, 2018 WL 2234598, at *2-
27 3 (N.D. Cal. May 15, 2018) (finding “[t]he reaction of the class was overwhelmingly positive” where “[n]o
28 class members objected, and only one class member submitted a request for exclusion”); *Jarrell v. Amerigas*
Propane, Inc., 2018 WL 1640055, at *2 (N.D. Cal. Apr. 5, 2018) (finding “[t]he reaction of the class
was overwhelmingly positive” where “[n]o objections were received, and only three class members, or
approximately 1% of the class, opted out.” (record citation omitted)).

1 find that the 3.21% claims rate supports final approval here, particularly in light of the low opt-out rate and
 2 lack of objections. *See Touhey v. United States*, 2011 WL 3179036, at *7-8 (C.D. Cal. July 25, 2011)
 3 (approving settlement where only 38 claims were filed, which was “approximately 2%” claims rate, based
 4 in part on “the lack of objections”); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377-78 (S.D. Fla. 2007)
 5 (approving settlement with claims rate of about 1.2%); *see also* PA Fitzgerald Decl. Ex. 9 (discussing *Bayol*
 6 *v. Health-Ade LLC*, No. 18-cv-1462 (N.D. Cal.) (approving settlement with 1.09% claim rate); *Broomfield*
 7 *v. Craft Brew Alliance, Inc.*, No. 17-cv-1027 (N.D. Cal.) (approving settlement with 1.83% claim rate)).

8 **G. The Risk of Maintaining Class Action Status Through Trial**

9 “This factor, which concerns the risk of maintaining class certification, also favors settlement.”
 10 *Larsen*, 2014 WL 3404531, at *4. While “[t]he Court already granted class certification,” “and conditionally
 11 certified a class for settlement purposes only in granting preliminary approval,” “[u]nder Federal Rule of
 12 Civil Procedure 23(c)(1)(C), an ‘order that grants . . . class certification may be altered or amended before
 13 the final judgment.’” *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2017 WL 4685536, at *4 (C.D. Cal.
 14 May 8, 2017) (quoting Fed. R. Civ. P. 23(c)(1)(C)). Thus, “[a]lthough Plaintiffs believe they would be
 15 successful in maintaining class action status through trial and appeal,” because Kellogg “vigorously opposed
 16 class certification, previously filed a [23(f) petition to appeal certification], and indicated its intention to
 17 challenge certification again,” “the risk that Defendant may prove successful in attacking class certification,
 18 . . . favors final approval of the Settlement Agreement.” *See id.*; *see also Edwards*, 2017 WL 3623734, at *7
 19 (“Although plaintiffs are confident the class would remain certified through trial, the risk ‘was not so minimal
 20 that this factor could not weigh in favor of the settlement.’” (quotation and citation omitted)).

21 **IV. CONCLUSION**

22 Each of the *Churchill* factors favors granting the Settlement final approval. Plaintiffs respectfully
 23 request the Court do so, and enter Judgment.

24
 25 Dated: September 23, 2021

Respectfully Submitted,

26 /s/ Jack Fitzgerald _____

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